

No. 10542

United States
Circuit Court of Appeals
For the Ninth Circuit.

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Appellant,

vs.

I. BROMBERG,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

OCT 7 - 1943

PAUL P. O'BRIEN,
CLERK

No. 10542

United States
Circuit Court of Appeals
For the Ninth Circuit.

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Appellant,

vs.

I. BROMBERG,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Amended Answer	5
Appeal:	
Certificate of Clerk to Transcript of Record on	24
Designation of Record on (DC).....	22
Notice of	17
Order Extending Time to File Record on..	21
Order Transmitting Original Exhibits on..	23
Statement of Points on which Appellant Intends to Rely on (CCA).....	117
Supersedeas Bond on	19
Certificate of Clerk to Transcript of Record on Appeal	24
Complaint	2
Conclusions of Law and Judgment.....	16
Designation of Record on Appeal (DC).....	22
Findings of Fact, Conclusions of Law and Judgment	12
Judgment	16
Names and Addresses of Attorneys of Record..	1

Index	Page
Notice of Appeal	17
Order Extending Time to File Record on Appeal	21
Order Transmitting Original Exhibits on Appeal	23
Pre-Trial Order	7
Statement of Points on which Appellant Intends to Rely (CCA)	117
Supersedeas Bond on Appeal.....	19
Transcript of Evidence	26
Exhibits for Defendant:	
14—Deposition of I. Bromberg, the Plaintiff	89
15—Original Complaint	107
Exhibits for Plaintiff:	
16—Original Answer	70
17—Statement of James Lenhart.....	81
Motion of Defendant to Dismiss.....	72
Stipulation re Testimony of William Bembridge	115

Index	Page
Witness for Defendant:	
Lenhart, James	
—direct	74
—cross	78
—redirect	84, 87
—recross	84, 87
Witnesses for Plaintiff:	
Bromberg, I.	
—direct	52
Cline, Genevieve	
—direct	54
—cross	63
—redirect	65
Cowderoy, C. V.	
—rebuttal, direct	113
Goss, John	
—direct	67
—cross	68
Hervin, Mrs. I. E.	
—direct	27
—cross	35
—redirect	44
Mayer, Jr., Sidney	
—direct	45
Mercer, George A.	
—rebuttal, direct	111

NAMES AND ADDRESSES OF
ATTORNEYS OF RECORD:

SIMON, GEARIN, HUMPHREYS & FREED,

Failing Building,
Portland, Oregon

for Appellant:

WILBUR, BECKETT, HOWELL & OPPEN-
HEIMER, ROBT. R. MAUTZ,

Board of Trade Building,
Portland, Oregon

for Appellee.

In the District Court of the United States
for the District of Oregon

July Term, 1942

Be It Remembered, That on the 16th day of September 1942, there was duly filed in the District Court of the United States for the District of Oregon, a complaint in words and figures as follows, to wit: [1*]

In the District Court of the United States
for the District of Oregon

Civil No. 1389

I. BROMBERG,

Plaintiff

vs.

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Defendant

COMPLAINT

The plaintiff complains of the defendant and for cause of action alleges:

I.

That at all times herein mentioned the defendant was and is a foreign corporation, duly authorized to transact business in the State of Oregon and is transacting business in said State as a telegraph company and with its principal office and place of business in

*Page numbering appearing at foot of page of original certified Transcript of Record.

the City of Portland, Oregon; that in connection with its business in the State of Oregon the defendant employed numerous persons to pick up and deliver messages and packages; that at all times herein mentioned, one Genevive Cline was employed by the defendant as a messenger and among other things, picked up and delivered messages for the defendant at hotels and business houses in the downtown district of Portland, Oregon and that at the time of the accident hereinafter referred to the said Genevive Cline was acting in the course of her employment for the defendant and in the furtherance of its business.

II.

That on the first day of June, 1942 and prior thereto the plaintiff resided at the Congress Hotel in Portland, Oregon and on said date was standing behind the said Genevive Cline near the main desk of said hotel in the lobby thereof awaiting [2] his turn to ask for his mail. That said Genevive Cline, then and there acting for and on behalf of the defendant, carelessly, recklessly and negligently made a sudden and abrupt turn from said desk and walked directly into and against the plaintiff, knocking him to the floor of said hotel lobby and causing the injuries hereinafter described.

III.

As a direct and proximate result of the carelessness, recklessness and negligence of the defendant through its said employee as aforesaid the plaintiff sustained a fracture of the neck of the right femur with external rotation of the distal fragment and

some coxavara and was caused to suffer physical pain and mental anguish and to become lame and disabled and was required to be hospitalized and to be attended by physicians and to be operated upon, and the plaintiff has been disabled and under medical treatment and hospitalized ever since and will be for an indefinite time in the future all to his general damage in the sum of \$7500.00.

IV.

That by virtue of said injuries the plaintiff has been caused to incur expenses for hospital, nursing, physicians, x-rays, rest home, ambulance and wheelchair in the sum of \$1,413.70 to date which the plaintiff claims as special damages.

V.

That this controversy is between citizens of different states and the amount involved exceeds the sum of \$3000.00, exclusive of interests and costs.

Wherefore, plaintiff prays judgment against the defendant for the sum of \$7500.00, general damages and the further sum of \$1,413.70, special damages and for his costs and disbursements herein incurred.

WILBUR, BECKETT,

HOWELL & OPPENHEIMER

By: ROBERT T. MAUTZ

Attorneys for Plaintiff

1001 Board of Trade Building

Portland, Oregon

[Endorsed]: Filed September 16, 1942. [3]

And Afterwards, to wit, on the 2nd day of March, 1943, there was duly Filed in said Court, an amended answer in words and figures as follows, to wit : [4]

[Title of District Court and Cause.]

AMENDED ANSWER

Defendant answers the complaint as follows :

FIRST DEFENSE

I.

Admits the allegations of paragraph I.

II.

Answering paragraph II, admits that portion thereof down to and including the word "mail" in line 1 on page 2; and denies the remainder of said paragraph.

III.

Denies the allegations of paragraph III.

IV.

Answering paragraph IV states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph, and therefore denies the same.

V.

Admits the allegations of paragraph V.

SECOND DEFENSE

The plaintiff was guilty of negligence which contributed to and proximately caused any injuries

which he may have suffered at the time and place complained of, in that he carelessly and negligently, without warning or notice of any kind to the messenger Genevieve Cline, placed himself in and remained in such a position in relation to her as to cause her to come in contact with him when she turned to leave her position at the desk at the Congress Hotel. [5]

Wherefore defendant prays that plaintiff take nothing by his complaint and that defendant have judgment for its costs and disbursements.

SIMON, GEARIN,
HUMPHREYS & FREED
EDGAR FREED

Attorneys for Defendant
1111 Failing Building
Portland, Oregon

State of Oregon
County of Multnomah—ss.

Due service of the within Amended Answer is hereby accepted in Multnomah County, Oregon this 2nd day of March, 1943 by receiving a copy thereof, duly certified to as such by Edgar Freed of Attorneys for Defendant.

ROBERT T. MAUTZ
Of Attorneys for Plaintiff

[Endorsed]: Filed March 2, 1943. [6]

And Afterwards, to wit, on Thursday, the 11th day of March, 1943, the same being the 10th Judicial day of the Regular March Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [7]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

APPEARANCES

Attorneys for plaintiff:

Robert T. Mautz (Wilbur, Beckett, Howell
& Oppenheimer).

Attorneys for Defendant:

Edgar Freed (Simon, Gearin, Humphreys
& Freed).

NATURE OF ACTION

This is an action to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of the defendant acting by an employee.

STATEMENT OF THE CASE

On the 1st day of June, 1942, the plaintiff, an elderly man, resided at the Congress Hotel in Portland, Oregon. On said date the defendant employed one Genevieve Cline, among others, as a messenger in Portland, Oregon. In connection with her duties for the defendant, the said Genevieve Cline picked up

and delivered messages for the defendant at hotels and business houses in the downtown district of Portland, Oregon.

On the date aforesaid, the said Genevieve Cline, while engaged in the scope of her duties for the defendant, was standing at the main desk in the lobby of said Congress hotel, either picking up or delivering a telegram or other message of some sort. The plaintiff at said time was standing to the rear of the said Genevieve Cline, either directly behind her or a bit to one side, and was waiting to step to said main desk and ask for his mail. [8] After leaving her position at said hotel desk, as aforesaid, the said Genevieve Cline came in contact with the plaintiff following which he fell to the floor of the lobby of said hotel.

CONTENTIONS OF PARTIES

The plaintiff contends that he was knocked to said floor by the said Genevieve Cline who was then and there acting for the defendant and that when the said Genevieve Cline made a sudden and abrupt turn from said desk and walked directly into the plaintiff, knocking him to the floor she was guilty of negligence which was the proximate cause of the injuries suffered by the plaintiff.

The plaintiff contends that as a proximate result of the negligence of the defendant the plaintiff suffered a fracture of the neck of the right femur with external rotation of the distal fragment and some coxavara, and that he was caused to suffer physical

pain and mental anguish and to become lame and disabled, and that he was required to be hospitalized and attended by physicians and to be operated upon to his general damage in the sum of \$7500.00.

The plaintiff contends that by reason of said injuries he has been caused to incur expenses for hospital, nursing, physicians, X-rays, rest home, ambulance and wheel-chair in the sum of \$1413.70.

The defendant denies that the plaintiff was knocked to the floor by said Genevieve Cline; denies that said Genevieve Cline turned abruptly or was negligent; and affirmatively contends that the plaintiff was guilty of contributory negligence in placing himself in a position closely behind and beside said Genevieve Cline without any notice or warning to her.

And the defendant contends that as a matter of law it would not be liable to the plaintiff even if its said messenger negligently walked into plaintiff, as the plaintiff contends, because the Congress hotel is a public place at which the messenger [9] was present in the exercise of a public right and was using only her body and not any vehicle or instrumentality furnished by the plaintiff.

The defendant denies on information and belief that the plaintiff was generally damaged or specially damaged.

ADMITTED FACTS

1. It is admitted that defendant is a foreign corporation duly authorized to transact business in the State of Oregon and that it is transacting business in said state as a telegraph company with its principal

office and place of business in Portland, Oregon, and that in connection with its business in said state it employs numerous persons to pick up and deliver messages and packages.

2. It is admitted that at the time of the accident herein involved the plaintiff was a resident of the Congress Hotel, that at said time Genevieve Cline was employed by the defendant as a messenger to pick up and deliver messages, and at said time was in the course of picking up or delivering a message for the defendant.

3. It is admitted that on the 1st day of June, 1942, the plaintiff was standing behind and a little to the side of the said Genevieve Cline near the main desk of the Congress Hotel in the lobby thereof waiting to ask for his mail, and that after the said Genevieve Cline left her position at said desk there was a contact between her and the plaintiff.

4. It is admitted that the controversy herein is between citizens of different states and that the amount involved exceeds the amount of \$3000, exclusive of interests and costs.

ISSUES TO BE DETERMINED

1. Was the defendant, through its employee, guilty of negligence which proximately caused the accident in question?

2. Was the plaintiff guilty of negligence which proximately caused or contributed to cause the accident in question?

3. Would the defendant be liable for injuries caused by its messenger's walking into plaintiff even

if she did so negligently and the plaintiff was not guilty of contributory negligence? [10]

4. What are the nature and extent of the injuries suffered by plaintiff by reason of said accident?

5. If the plaintiff is entitled to recover, in what amount has he been damaged, both generally and specially?

LIST OF PRE-TRIAL EXHIBITS

- Plt's 1 - 8 Eight X-rays marked on first Pretrial.
9-10 Two impeaching documents sealed.
11-12 Two X-rays.
13 Deposition Genevieve Cline.
Deft's 14 Deposition of I. Bromberg.
15 Original complaint.
Plt's 16 Original answer.

Defendant was, by the Court, permitted to, and did, amend its answer by adding a defense of contributory negligence.

Based upon hearing before this court and the court being fully advised in the premises, it is hereby

Ordered that the foregoing constitutes the pre-trial order in the above matter.

Dated this 11th day of March, 1943.

CLAUDE McCOLLOCH

Judge

State of Oregon

County of Multnomah—ss.

Due service of the within Pre-Trial Order is hereby accepted in Multnomah County, Oregon this . . . day of March, 1943 by receiving a copy thereof, duly

certified to as such by Edgar Freed of Attorneys for Defendant.

.....
Of Attorneys for Plaintiff

[Endorsed]: Filed March 11, 1943. [11]

And Afterwards, to wit, on Thursday, the 18th day of March, 1943, the same being the 16th Judicial day of the Regular March, 1943 Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [12]

In the District Court of the United States
for the District of Oregon

No. Civil 1389

I. BROMBERG,

Plaintiff

vs.

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Defendant

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT.

This matter came on duly and regularly for trial on the 11th day of March, 1943, before the Honorable Claude McColloch, Judge of the above-entitled court, sitting without the intervention of a jury.

The plaintiff appeared in person and by Robert T. Mautz (Wilbur, Beckett, Howell & Oppenheimer), his attorney, and the defendant by Edgar Freed (Simon, Gearin, Humphreys & Freed), its attorneys.

Evidence was introduced on behalf of the respective parties and the matter was submitted to the Court, who took the same under advisement, and having considered the same and being fully advised in the premises, makes the following:

FINDINGS OF FACT

I.

That on or about the first day of June, 1942, the defendant was and is a foreign corporation duly authorized to transact business in the State of Oregon and transacting business in said State as a telegraph company with its principal office and place of business in the City of Portland, Oregon; that in connection with its business in the State of Oregon the defendant employed numerous persons to pick up and deliver messages and packages; that on said date one Genevieve Cline was employed by the defendant as a messenger primarily for the purpose of picking up and delivering messages for the defendant at hotels and business houses in the downtown district of Portland, Oregon; that at the time of the accident herein involved the said Genevieve Cline was acting in the course of her employment for the defendant, within the scope of her duties as a messenger for the defendant and in the furtherance of its business. [13]

II.

That on said date and prior thereto the plaintiff, an elderly man, resided at the Congress Hotel, in Portland, Oregon. On said date the said Genevieve Cline while engaged in the scope of her duties for the defendant was standing at the main desk in the lobby of said hotel, either picking up or delivering a telegram or other message of some sort. The plaintiff at said time was standing to the rear of the said Genevieve Cline, either directly behind her or a bit to one side, and was waiting to step to said main desk and ask for his mail. After leaving her position at said hotel desk, as aforesaid, the said Genevieve Cline made an abrupt turn and walked directly into and against the plaintiff, knocking him to the floor of the lobby of said hotel.

III.

That the defendant by and through the said Genevieve Cline at said time and place was careless, reckless and negligent in abruptly turning from said hotel desk and walking directly into and against plaintiff. That there was ample and sufficient room and space for the said Genevieve Cline to have proceeded on her way in said hotel lobby without coming in contact with the plaintiff had she been keeping a proper lookout and exercising due care for the rights of others in said hotel lobby and particularly the plaintiff.

IV.

That at said time and place the plaintiff was not guilty of any negligence.

V.

As a direct and proximate result of the carelessness, recklessness and negligence of the defendant through its said employee, as aforesaid, the plaintiff sustained a fracture of the neck of the right femur with external rotation of the distal fragment and some coxa vera and he was caused to suffer physical pain and to become lame and disabled and he was required to be hospitalized and to be attended by physicians, and it was necessary for a major operation to be performed upon the plaintiff and for a large surgical pin to be inserted in the bones of the right hip in order to join and firmly fix the fractured portions thereof and ever since the date of said accident with the exception of two or three days the plaintiff has been confined to convalescent homes or hospitals [14] and he has suffered some permanent injury by reason of said injuries, all to his general damage in the sum of \$2500.00.

VI.

That by virtue of said injuries the plaintiff was caused to incur expenses for hospital, nursing, physicians, X-rays, rest homes, ambulance and wheel chair, as follows:

Hospital,	\$ 272.70
Nurses,	459.55
Doctors:	
Dr. Sidney Mayer,	150.00
Dr. Gilbert J. McKelvey	200.00
Dr. Leon Goldsmith,	3.50
X-rays,	12.00

Ambulance,	12.00
Wheelchair	6.00
Rest Homes,	1394.95
<hr/>	
Total—	\$2510.70

VII.

That prior to the accident aforesaid the plaintiff's board and room at the Congress Hotel cost him \$75 per month, and the special damages should therefore be reduced by the sum of \$750 and the Court thus finds that the plaintiff has been specially damaged by reason of said accident and the injuries aforesaid in the sum of \$1760.70.

Based upon the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

I.

That the plaintiff is entitled to have and recover judgment against the defendant in the sum of \$2500. as general damages and the sum of \$1760.70 as special damages.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court makes and enters the following

JUDGMENT

Now, Therefore, It Is Considered Ordered and Adjudged that the plaintiff, I. Bromberg, have and recover judgment against the defendant, Western Union Telegraph Company, a corporation, in the sum of \$2500 as general damages, and the further sum of \$1760.70 as special damages, together with

his costs and disbursements incurred herein to [15] be taxed by the Clerk, together with interest at 6% per annum on the foregoing from the date hereof and that execution issue therefor.

Dated this 18th day of March, 1943.

CLAUDE McCOLLOCH,
Judge

To the Western Union Telegraph Company, above-named defendant and to Simon, Gearin, Humphreys & Freed, and Edgar Freed, Defendant's attorneys:

You and each of you will please take notice that the plaintiff will present the foregoing findings, conclusions and judgment to the Honorable Claude McCulloch in his courtroom at 10:00 o'clock A. M. on Saturday, March 20, 1943.

ROBERT T. MAUTZ,
Of Attorneys for Plaintiff.

[Endorsed]: Filed March 18, 1943. [16]

And Afterwards, to wit, on the 16th day of June, 1943, there was duly Filed in said Court, a Notice of Appeal in words and figures as follows, to wit:

[17]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Western Union Telegraph Company, Defendant above named, hereby

appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this case on the 18th day of March, 1943, and from the whole thereof.

Dated this 15th day of June, 1943.

SIMON, GEARIN,
HUMPHREYS & FREED
EDGAR FREED

Attorneys for Appellant
Western Union Telegraph
Company

State of Oregon,
County of Multnomah—ss.

Service of the within Notice of Appeal is hereby accepted in Multnomah County, Oregon, this 15th day of June, 1943, by receiving a copy thereof, duly certified to as such by Edgar Freed of Attorneys for Defendant.

Sgd. ROBERT T. MAUTZ,
Of Attorneys for Plaintiff.

[Endorsed]: Filed June 16, 1943. [18]

And Afterwards, to wit, on the 16th day of June, 1943, there was duly Filed in said Court, Supersedeas Bond in words and figures as follows, to wit: [19]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents, That we, The Western Union Telegraph Company, a corporation, as principal, and Glens Falls Indemnity Company, a corporation of the State of New York authorized to become surety upon appeal bonds, as surety, are held and firmly bound unto I. Bromberg, plaintiff in the above-entitled case, in the sum of Five Thousand (\$5,000.00) Dollars; for the payment of which we bind ourselves, our successors and assigns, jointly and severally, by these presents.

The condition of the foregoing obligation is such that,

Whereas, said The Western Union Telegraph Company, defendant in the above-entitled case, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment rendered against it and in favor of said I. Bromberg, plaintiff in the above-entitled case, on the 18th day of March, 1943;

Now Therefore, if said appellant shall prosecute said appeal to effect; or if it shall satisfy the judgment in full, together with costs, interest and damages for delay, in the event the appeal is dismissed or said judgment is affirmed; or if it shall satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, in the event said judgment is modified; then the above obliga-

tion shall be void; otherwise it shall remain in full force and effect. [20]

In Witness Whereof, The Western Union Telegraph Company has caused this instrument to be executed by its attorneys; and Glens Falls Indemnity Company has caused these presents to be executed by its duly authorized attorney-in-fact this 15th day of June, 1943.

THE WESTERN UNION
TELEGRAPH COMPANY
By SIMON, GEARIN, HUM-
PHREYS & FREED
Its Attorneys
GLENS FALLS INDEMNITY
COMPANY
By GEO. B. RODGERS
Attorney

[Seal]

Approved:

JAMES ALGER FEE
Judge

State of Oregon,
County of Multnomah—ss.

Service of the within Supersedeas Bond is hereby accepted in Multnomah County, Oregon, this 15th day of June, 1943, by receiving a copy thereof, duly certified to as such by Edgar Freed, of Attorneys for Defendant.

Sgd. ROBERT T. MAUTZ,
of Attorneys for Plaintiff.

[Endorsed]: Filed June 16, 1943. [21]

And Afterwards, to wit, on Tuesday, the 13th day of July, 1943, the same being the 8th Judicial day of the Regular July Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [22]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE RECORD ON APPEAL AND DOCKET CASE
IN APPELLATE COURT

Based on the stipulation of the parties, it is ordered that the time for filing the record on appeal and docketing this action in the Circuit Court of Appeals be and it hereby is extended to and including the 10th day of September, 1943.

Dated the 13th day of July, 1943.

CLAUDE McCOLLOCH

Judge

[Endorsed]: Filed July 13, 1943. [23]

And Afterwards, to wit, on the 22nd day of June, 1943, there was duly Filed in said Court, a Designation of Contents of Record on Appeal in words and figures as follows, to wit: [24]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

The Western Union Telegraph Company, defendant above named, and the appellant in the appeal of the above entitled case to the Circuit Court of Appeals for the Ninth Circuit, hereby designates the following for inclusion in the Record on Appeal:

The complete record, proceedings and evidence in the said case, which shall include:

Complaint

Amended Answer

Pre-Trial Order

Transcript of Testimony

All Exhibits

Finding of Fact, Conclusions of Law, and Judgment

Notice of Appeal

Supersedeas Bond

Designation of Contents of Record on Appeal

SIMON, GEARIN, HUM-

PHREYS & FREED

EDGAR FREED

Attorneys for Appellant

Western Union Telegraph
Company

State of Oregon

County of Multnomah—ss

Due service of the within Designation of Contents of Record on Appeal is hereby accepted in

Multnomah County, Oregon this 17th day of June, 1943 by receiving a copy thereof, duly certified to as such by Edgar Freed of Attorneys for Defendant.

WILBUR, BECKETT, HOW-
ELL & OPPENHEIMER and
ROBERT T. MAUTZ

S. D.

of Attorneys for Plaintiff.

[Endorsed]: Filed June 22, 1943. [25]

And Afterwards, to wit, on Thursday, the 26th day of August, 1943, the same being the 45th Judicial day of the Regular July Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [26]

ORDER TO SEND ORIGINAL EXHIBITS TO
APPELLATE COURT

It is ordered that the clerk of this Court send to the United States Circuit Court of Appeals for the Ninth Circuit, as a part of the Record on Appeal in this case, the original exhibits instead of copies thereof, except the original complaint (Exhibit 15) and the original answer (Exhibit 16) in which instances certified copies shall be sent.

Dated this 26th day of August, 1943.

JAMES ALGER FEE

Judge

Consented to:

ROBERT T. MAUTZ

Of Attorneys for Plaintiff

EDGAR FREED

Of Attorneys for Defendant

[Endorsed]: Filed August 26, 1943. [27]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

United States of America

District of Oregon—ss:

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered 1 to 28 inclusive constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 1389, in which I. Bromberg is Plaintiff and Appellee, and the Western Union Telegraph Company, a corporation, is Defendant and Appellant; that said transcript has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

I further certify that I am transmitting with the said transcript the duplicate of the reporter's transcript filed in the clerk's office.

I further certify that I am transmitting to the Circuit Court of Appeals for the Ninth Circuit, pursuant to an order of the District Court of the United States for the District of Oregon, exhibits Nos. 1 to 16 inclusive.

I further certify that the cost of the foregoing transcript is \$7.90, and \$5.00 for filing Notice of Appeal, making a total of \$12.90 which has been paid by the appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 4th day of September, 1943.

[Seal] LOWELL MUNDORFF, Clerk.

By F. L. BUCK

Chief Deputy [28]

Civil Action No. 1389.

[Title of District Court and Cause.]

TRANSCRIPT OF EVIDENCE

Portland, Oregon, Thursday, March 11, 1943.

10:00 o'Clock A. M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Wilbur, Beckett, Howell & Oppenheimer (By
Mr. Robert T. Mautz),

Attorneys for the Plaintiff;

Simon, Gearin, Humphreys & Freed (By Mr.
Edgar Freed),

Attorneys for the Defendant.

PROCEEDINGS [1*]

Mr. Freed: If your Honor please, maybe you are already familiar with the lobby of the Congress Hotel; I don't know whether you have seen it or not; if not, I suggest that it might be of advantage to the Court at some time to look at the scene of this accident. Whether you prefer to do it before or subsequently I would not know. I would think it would be helpful, though.

The Court: I will walk through at *at* the noon hour. [2]

* Page numbering appearing at top of page of original Reporter's Transcript.

PLAINTIFF'S EVIDENCE

MRS. I. E. HERVIN

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Mautz:

Q. Your name is Mrs. I. E. Hervin?

A. Yes.

Q. What is your given name?

A. Carrie B. Hervin.

Q. Your husband is local manager of the Metropolitan Life Insurance Company? A. Yes.

Q. The plaintiff is your father, I believe?

A. Yes.

Q. Mrs. Hervin, what was your father's condition prior to this acci- [3] dent in June of 1942?

A. Well, my father used to attend his office quite regularly, going down there by himself, and he was very active in many organizations.

The Court: Hadn't you better sit by him? He seems to be a little nervous.

The Witness: Yes. Just sit down by him? Could I sit here?

The Court: It would be better.

The Witness: All right. He was very active in organizations, attended meetings, conducted meetings, and he wasn't what I would call strong. He used a cane and depended on us often to give him our arm if he walked any distance, but he

(Testimony of Mrs. I. E. Hervin.)

was able to conduct his affairs, and did, as I said, go to his office, oh, I would say about three times a week.

Q. How old is your father?

A. He is eighty-seven.

Q. And was he doing the things that you have mentioned right along up until the time of this accident?

A. Yes. I wouldn't say that he attended office regularly.

Q. I understand.

A. I don't mean to imply that. But he did go and look over his books, and he knew his accounts and kept in touch with his clients and that sort of thing.

Q. Where did he live prior to this accident?

A. He lived at the Congress Hotel. [4]

Q. And did he require anyone to live there with him?

A. No.

Q. He lived there alone?

A. Yes.

Q. What had been your father's business?

A. He was in the insurance business.

Q. And for a good many years?

A. Yes, for a good many years.

Q. In Portland?

A. In Portland.

Q. And did he still maintain an office at all before the accident?

A. Yes. He was with the Insurance Service Company, and he had maintained his desk with them. He had his desk in the office.

Q. I suppose, of course, he was quite inactive in business at that time?

(Testimony of Mrs. I. E. Hervin.)

A. Yes. He just kind of looked over his correspondence there and he took care of the accounts he had. I don't think he solicited any new business.

Q. And where was his office?

A. He was—let's see. Is it in the Corbett Building? It is the Insurance Service. It is on Fifth and Morrison.

Q. How did he get from the Congress Hotel to his office and back again?

A. He generally walked. On occasions he took a taxi but very rarely. [5]

Q. Does he have any other children in the city besides yourself? A. Yes.

Q. And state whether or not he would get to your home frequently for meals and things like that.

A. Oh, yes, he did, very frequently. He was at my house, oh, at least once, more often twice, a week, and at the others——

Q. What was his mental condition at that time as to being able to remember and tell what was going on, and things of that kind?

A. He was very alert.

Q. He was very alert? A. Very alert.

Q. Now what change, if any, has there been in your father's condition since the date of the accident?

A. Well, there is a very perceptible change in his whole mental attitude. He forgets an awful lot. He doesn't seem to remember nearly the things that he did. In fact, the thing that seems

(Testimony of Mrs. I. E. Hervin.)

to bother him most is that he does not remember and it concerns him and worries him most. And of course physically he is not in the condition he was then, either.

Q. What is his ability to get around, and so on, by himself?

A. Oh, that is utterly impossible.

Q. Where has he been living since the accident?

A. Immediately after he left the hospital he went to the Bellvilla Sanitarium and lived there some time; then he thought again he would like to try to live in the hotel and be alone, so we gave him the [6] opportunity because he was so persistent, to go to the Campbell Hotel. It is a family hotel. He was there about two days, maybe three, and we found it impossible. Then we moved him to the Gard Convalescent Home, where he has been ever since.

Q. In other words, he was immediately taken to the hospital? A. Yes.

Q. Then he went to the Convalescent Home on the East Side? A. Yes.

Q. Then you gave him an opportunity to try to resume his former mode of living in a hotel which he was able to do just two or three days?

A. Yes.

Q. And continuously since then he has been at the Gard Convalescent Home, which is at Eighteenth and Johnson? A. Yes.

Q. Has he ever been in his office since the accident? A. Oh, no.

(Testimony of Mrs. I. E. Hervin.)

Q. He has not? A. No.

Q. Is his ability of locomotion as good now as it was before, as you observe?

A. Oh, no. He just hardly will attempt to move without some help.

Q. So far as you know, has he ever gone out in the streets, in the public, on the sidewalks and streets, and walked by himself since the accident?

A. Oh, no. [7]

Q. Never once?

A. Not by himself. I have walked him about a half a block or so.

Q. Let me ask you this question, Mrs. Hervin; whether it is technically and strictly proper I don't know; but he told you—I am not going to ask her what he told her—he told you how the accident happened after it occurred, did he? A. Yes.

Q. Now what is his ability at this time to tell you how the accident happened as compared with his ability shortly after it occurred?

A. I don't think it could compare at all. He seems to be so concerned that he will forget that he does forget.

Q. I see. Mrs. Hervin, have you been more or less in charge, either of paying for him or looking after the bills that he has had as a result of this accident? A. Yes, I did generally.

Q. Now state whether or not he had any special nurses immediately after the accident?

A. Oh, he had three nurses constantly for about—at least two weeks.

(Testimony of Mrs. I. E. Hervin.)

Q. You don't know the exact period of time he had those, do you?

A. No. But had I known the question was going to be asked I could have been more specific about it.

Q. But he had three nurses every day for you think around two weeks? [8]

A. Oh, I am sure it must have been that.

Q. Then how many special nurses?

A. Then he had two nurses, then gradually we got him to one; then when he went to the Convalescent Home his nurse stayed with him about a week; then we got practical nurses to stay with him.

Q. Now do you know what the total sum was that was paid for special nurses for your father as a result of the accident?

A. I did jot that down. \$459.55.

Q. What hospital was your father confined in?

A. St. Vincent's.

Q. What was his hospital bill?

A. \$272.70.

Q. And what doctors attended your father?

A. Dr. Sidney Mayer, Jr.; Dr. McKelvey was the surgeon; Dr. Leon Goldsmith came in just as, oh, sort of a consultant.

Q. I understand Dr. Goldsmith had been your father's attending physician for a number of years?

A. Yes.

Q. Before Dr. Sidney Mayer came into your

(Testimony of Mrs. I. E. Hervin.)

family, and then he started taking care of your father; is that right?

A. Yes, that is right.

Q. And Dr. McKelvey, who is an orthopedist with the Portland Clinic, is the one who performed the operation on your father, I think?

A. Yes, sir.

Q. Dr. Goldsmith just saw your father once?

[9]

A. That is right.

Q. Do you have the bills of those three doctors?

A. I had the bill of Dr. McKelvey, and I had the bill of Dr. Goldsmith, and in sending checks to them I mailed the bills back and didn't ask them to return them, but I do have canceled checks in some instances.

Q. I didn't mean the physical bills. What was Dr. McKelvey's charge?

A. Oh. Two hundred dollars.

Q. Dr. Goldsmith's?

A. Three dollars and a half.

Q. Dr. Mayer's?

A. Dr. Mayer's bill was one hundred and fifty dollars.

Q. Now the hospital bill that you mentioned included some x-rays, then I think you paid for some subsequent x-rays; is that true?

A. Yes.

Q. What did you pay subsequently for x-rays?

A. Twelve dollars.

(Testimony of Mrs. I. E. Hervin.)

Q. Twelve dollars. What did you pay for rest home for your father up to the time that we filed this complaint? A. \$297.95.

Q. And what have you paid for rest home for your father since that time?

A. At the Bellvilla it was four hundred and thirteen dollars, and at the Gard Convalescent, where he has been for the past five months or more, it was seven hundred and two dollars, which makes [10] there a total of eleven hundred and fifteen.

Q. \$1115 has been paid for convalescent homes subsequent to the filing of the complaint, in which we listed the special damages up to that time?

A. Yes.

Q. Do you know at what rate these rest home charges were made?

A. Well, when he went to the Bellvilla the rate was \$5.00 a day, and then with the increase in the cost of help and everything, at least so we were told, she raised it to six. The Gard Convalescent Home was six and a half a day.

Q. I see. Now about what was your father's average expense for board and room at the Congress Hotel per month?

A. I don't think it was ever beyond seventy-five collars.

Q. In other words, you think that for \$75.00 he got board and room himself?

A. Yes; because of the fact that he was able

(Testimony of Mrs. I. E. Hervin.)

to get around and came to our home so much for meals. Of course that made quite a difference.

Q. You have been familiar with your father's affairs for many years, have you?

A. More or less.

Q. And then you paid out something for ambulance and wheel chair?

A. Yes. The ambulance was \$12.00, and a wheel chair was \$6.00.

Mr. Mautz: I believe you may inquire.

Cross Examination [11]

By Mr. Freed:

Q. Mrs. Hervin, how long had it been prior to this accident since Mr. Bromberg had actively attended to his business?

A. Oh, I could not tell you definitely, Mr. Freed.

Q. Had it been months, I mean, or years?

A. Oh, yes. He just gradually tapered off. He did attend to his business, and he did, I would think, in the last few years occasionally solicit some new business, but it was generally from old friends or some one. But he did take care of it; he did take care of his accounts, and he did go and look them over and go and see his clients from time to time or keep in touch with them by the telephone.

Q. He used the telephone, you say?

A. Yes, sir.

(Testimony of Mrs. I. E. Herwin.)

Q. His impaired hearing didn't affect that?

A. Not so much. It became increasingly difficult for him as time went on for the last—oh, for the past few months before his accident it was harder for him.

Q. Well, his activities were impaired then prior to the accident?

A. Well, more or less, only to the extent that he wasn't—I don't say physically active. I mean his movements were not quick, but he did manage to go around; he did manage to attend meetings, and he did manage to go to his office.

Q. Those were meetings of civic organizations you speak of?

Q. Well, yes; and educational organizations he was interested in. [12]

Q. Public meetings?

A. Well, yes, they were public meetings.

Q. Do you have any idea how much approximately Mr. Bromberg weighed on June 1st of last year when this accident occurred?

A. I really could not say, but I would say he would be, just venturing a guess—

Q. Was he about the same weight that he is now, would you think?

A. I think he has lost a little weight. I wouldn't say, because sometimes his face looks fuller and I really could not say, but I think he has lost some weight.

Q. Would you say very much?

(Testimony of Mrs. I. E. Hervin.)

A. He was never a heavy man. I really wouldn't want to say definitely.

Q. Probably generally about the same in weight?

A. He is a little thinner.

Q. I don't want to ask you about his condition, because I don't think you know.

A. Well, yes. I think he is thinner, definitely thinner.

Q. His height I imagine is approximately the same? A. I imagine so. I don't know.

Q. Now prior to the accident Mr. Bromberg walked with a sort of a shuffling or dragging of his feet, didn't he? A. Sometimes.

Q. The gait and the movements which he exhibited in coming up to the chair that he has were not due entirely to this accident, [13] were they?

A. No, I wouldn't say entirely.

Q. He walked at that time, that is, prior to the accident, like an old gentleman? A. Yes.

Q. Now who made any arrangements that had to be made respecting Mr. Bromberg at the Congress Hotel?

A. What kind of arrangements do you mean?

Q. Well, as to keeping him there.

A. He made his own arrangements.

Q. Did the Congress Hotel ever communicate with you respecting Mr. Bromberg?

A. No, I don't—you mean with respect to his business, or anything of that sort?

Q. No; with respect to their keeping him at the hotel. A. Oh. Oh, yes, they did.

(Testimony of Mrs. I. E. Hervin.)

Q. That was how long prior to this accident?

A. Oh, a few months.

Q. A few months prior to the accident?

A. Uh huh.

Q. Do you recall who wrote you the letter for the hotel? A. Miss——

Q. Miss Troutwine? A. Miss Troutwine.

Q. She was one of the managers there? [14]

A. Yes. Uh huh.

Q. Did the hotel at that time—did she make any representations in that letter regarding Mr. Bromberg's physical condition, or did she ask you to call? A. She asked me to call.

Q. And did you call at the hotel?

A. Yes.

Q. And did she suggest that Mr. Bromberg should not be left at the hotel unattended?

A. Yes, she did. She suggested that—she suggested that his movements were slow; that when he came to the elevator they had to wait; it was an inconvenience to some of the other patrons of the hotel, and that she thought it would be better probably if he stayed in a hotel that wasn't a commercial hotel.

Q. But nothing came of that? You didn't take him out? A. No.

Q. Were there any modifications as a result of that meeting, were there any modifications made in Mr. Bromberg's stay at the hotel?

A. Yes; in that he had his breakfast in his room, because he was in the habit of getting up late in the

(Testimony of Mrs. I. E. Hervin.)

mornings and came down for breakfast at about noon, which was a very busy hour in the Coffee Shop, and so we arranged that he had his breakfast—and his movements were slow—we arranged that he have his breakfast in his own room.

Q. Was he having his breakfast in his room, did that arrangement [15] continue, until the time of the accident? A. Yes.

Q. And in this conversation the hotel did not complain to you that it was dangerous to leave Mr. Bromberg in the hotel there unattended?

A. I don't remember that they said it was dangerous.

Q. Well, did they indicate that it wasn't safe for him to be left there unattended in the hotel?

A. Well, they indicated to me that his movements were pretty slow and that he probably would be better where there was some one to watch him and care for him.

Q. Well then, their complaint to you then wasn't entirely, was it, Mrs. Hervin, on the ground that he slowed up things?

A. Well, as I recall it, Mr. Freed, it seems to me as though it was largely that.

Q. In the conversation or in the complaint she made, didn't it have some aspect of it not being entirely safe for Mr. Bromberg to be in the hotel unattended?

A. Well, they said he might be inclined to stumble over something. Yes, they did say that.

(Testimony of Mrs. I. E. Hervin.)

Q. And as a result was he just to have his breakfast or his other meals in the room?

A. Well, he was to have his breakfast, because he seldom ate dinners there. He seldom did have his meals there. He would go down in the afternoon and have a cup of tea or a cup of coffee. [16]

Q. But growing out of the conversation wasn't it understood between you and the hotel that he would not leave his room for meals?

A. Oh, no, I didn't understand that, because he did leave his room for meals and he had to go to restaurants around.

Q. Now he was not taken out of the hotel——

A. No.

Q. ——because he was there at the time of the accident? A. Yes.

Q. That \$75.00 that you said it cost him to stay at the hotel, was that a monthly amount that he paid the hotel?

A. Well, there was no regular amount. He paid, I don't recall exactly, I think it was thirty-six or something like that, dollars for his room, and the meals that he ate there.

Q. Whatever they came to?

A. Yes. Uh huh.

Q. You would not know exactly?

A. But I know pretty certain that his expenses did not as a rule exceed seventy-five dollars a month.

Q. Well, it was his room—— A. Yes, sir.

Q. ——plus whatever his food came to?

A. Yes.

(Testimony of Mrs. I. E. Hervin.)

Q. And there was no other sum paid to the hotel, in other words, for an attendant for Mr. Bromberg?

[17]

A. Oh, no; just for his room service.

Q. And that was the fair sleeping and eating charge?

A. That is right.

Q. If any attendant had been necessary that was not included in that seventy-five dollars?

A. No. There hadn't been any necessary.

Q. No, that is right. Now you say that after the accident Mr. Bromberg was able to tell you pretty clearly how the accident happened?

A. Oh, he was pretty excited and he said——

Q. You can't tell what he said to you.

A. Well, I could tell.

Q. I mean I am not asking you to tell.

A. Uh huh.

Q. You stated in answer to Mr. Mautz' question——

A. Yes.

Q. ——that he was able to give you a statement of the accident.

A. A clearer statement then than he can now.

Q. How long after the accident was that that you speak of?

A. Oh, I was there I think very shortly after.

Q. Oh, you mean a statement he made on the day of the accident?

A. Yes. Is that what you mean?

Q. Well, I wanted to find out what you meant.

A. Yes; yes.

(Testimony of Mrs. I. E. Hervin.)

Q. And subsequently did he discuss the accident with you? [18] A. Oh——

Q. And tell you how it happened?

A. Occasionally.

Q. Was he just as clear on the subsequent occasions soon after that as he was the first time?

A. Yes, soon after that he was.

Q. But as time went on since then he has grown more vague?

A. We really haven't discussed the accident with him too much, and it was only recently when he came here the last time that we had an occasion to realize that he couldn't give us clear stories as he had been giving us.

Q. Well, you were present when Mr. Bromberg's deposition was taken? A. Yes.

Q. In the Federal Court? A. Yes.

Q. And I would just like to ask you this question: Did Mr. Bromberg's version of the accident as given in his deposition coincide with the version he gave you soon after the accident?

A. Well, not exactly in detail, because when he said something about pushing with the hand he told us, as he told us originally, it seems that she in turning got her hand on him, or something; in turning she knocked him over.

Q. Well, the two were not the same?

A. Not exactly.

Q. They were not? [19]

A. (Witness shakes her head.)

(Testimony of Mrs. I. E. Hervin.)

Q. Now Dr. Sidney Mayer, who was spoken of, is your son-in-law? A. Yes.

Q. He would be Mr. Bromberg's grand son-in-law? A. Yes.

Q. If there is such a word. And you say that Mr. Bromberg's apparent inability to tell about the accident really now appears to stem from his fear that he will forget about it?

A. Well, I don't know. I am no authority on that, but I do know——

Q. I thought that was what you said.

A. Well, it seems to me that would be it, because he is just obsessed with the fear that he is going to forget.

Q. I see. Does Mr. Bromberg have an attendant now, a private attendant?

A. Not private now, no; just nurses in the nurse's home.

Q. He is at the Gard home? A. Yes.

Q. That is a rest home? A. Yes.

Q. It is a home where elderly people and sick people are? A. Yes.

Q. There are rather elderly people there?

A. Mostly convalescents.

Q. Now, Mr. Bromberg is eighty-seven now, I believe? A. Yes. [20]

Q. Is he past eighty-seven or not?

A. He is past eighty-seven.

Q. When was he eighty-seven?

A. In July.

(Testimony of Mrs. I. E. Hervin.)

Q. Well then, he wasn't quite eighty-seven at the time of this accident? A. No.

Q. And you would not say that prior to the accident, immediately prior to the accident, that he was steady on his feet, would you?

A. Well, not as steady as a man younger but for a man of his years I think he did pretty well.

Q. Sure he did. I think he does well now. He used a cane, didn't he? A. Yes.

Q. Just as he does now? A. Yes.

Q. And I believe that you said that he walked along, as I am going to describe for want of a better way, his feet pushing along instead of stepping along?

A. Yes, at times; because at other times he would pick up his feet and walk along. When he don't walk and his feet shuffle he seems to be conscious of it and he says, "I am not walking as well as a baby", and he would seem to pick up his feet.

Q. Well, at the hotel they did complain in that conversation that [21] he walked rather slowly?

A. Yes.

Q. Through the hotel, then? A. Yes.

Mr. Freed: I think that is all.

Redirect Examination

By Mr. Mautz:

Q. Mrs. Hervin, does Mr. Bromberg's present inability to remember, his vagueness in some things of that kind, is it only about the accident or is it general? A. No. It is general.

Q. It is general? A. Uh huh.

(Testimony of Mrs. I. E. Hervin.)

Q. As distinguished from the alertness that he had mentally before the accident?

A. There is a great difference, a marked difference.

Mr. Mautz: That is all.

(Witness excused.)

SIDNEY MAYER, Jr.

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Mautz:

Q. You are Dr. Sidney Mayer, Jr.? [22]

A. Yes.

Q. Dr. Mayer, are you licensed to practice the profession of physician in this state?

A. Yes.

Q. Just briefly, Doctor, what has been your training?

A. I am a graduate from the University of Oregon Medical School in 1936. From 1936 to 1940 I served a medical internship at Johns Hopkins. 1940 and '41 I was Assistant Professor of Medicine at the University of Oregon Medical School, and since 1941 I have been in private practice.

Q. You are a son-in-law of Mrs. Hervin, who just testified? A. Yes.

Q. Were you called to attend Mr. Bromberg.

(Testimony of Sidney Mayer, Jr.)

Mrs. Hervin's father, after his fall in June of 1942?

A. Yes.

Q. Where did you first see Mr. Bromberg?

A. In his hotel room.

Q. And what was his condition then?

A. He was lying back in bed, complaining of pain in his right hip, and gave the classical signs of fracture of the head of the right hip bone.

Q. What did you do with him?

A. I called Dr. Gilbert McKelvey, who is an orthopedic surgeon, and made arrangements to have him transferred immediately to St. Vincent's Hospital. [23]

Q. And subsequently at your request and in connection with your attendance upon him as attending physician, were X-rays taken? A. Yes.

Mr. Mautz: And would you hand the witness the X-rays, Mr. Joy, please.

Q. Would you select the X-rays that were first taken, Doctor? Would you care to see them in this machine or not?

The Court: Do you want him to point this out on the machine?

Mr. Mautz: Well, only if your Honor would be interested in it.

The Court: Just as you wish.

Mr. Mautz: They do demonstrate the fractures.

The Court: Where are the fractures?

A. In the head of the right femur.

Mr. Mautz: Q. And that is where, Doctor, from a layman's viewpoint, in the hip?

(Testimony of Sidney Mayer, Jr.)

A. Yes. It is in the hip bone, the upper part of the thigh bone just where it joins the head of the femur.

The Court: I wouldn't need to see them.

Mr. Mautz: All right.

Q. What type of fracture was that?

A. I am no expert orthopedic surgeon, but I believe it is what is called an intra-capsular fracture.

The Court: That is what is commonly called a hip fracture?

Mr. Mautz: A hip fracture?

The Court: Yes, with the usual kind of surgery. [24]

Q. You mentioned some coxa vara; what does that mean?

A. It means external rotation. In my note in that report I was quoting the X-ray reading at the St. Vincent's Hospital.

Q. That means a rotation of the bone to some extent?

A. Yes.

Q. Now what type of an operation was performed on Mr. Bromberg?

A. Dr. McKelvey performed a pin operation, whereby the broken fragments were put together with the aid of a metal pin.

The Court: What anesthetic?

Mr. Mautz: Q. What kind of anesthetic was used?

A. I don't know. I wasn't present at the time of the operation.

Q. Aren't you familiar in your practice—

(Testimony of Sidney Mayer, Jr.)

A. No.

Q. Doctor, would you consider that a minor operation or not? A. No.

Q. On a man seventy-eight?

A. That is a major operation.

Q. Ordinarily what type of anesthetic is used for that type of operation?

A. I really could not say. I don't know. I am not a surgeon.

Q. What kind of a pin is used for that kind of an operation?

A. It is called a Smith-Peterson pin. It is a specially treated metal pin.

Q. About what size?

A. Well, that was demonstrated in the X-ray picture. [25]

Q. Would you demonstrate that, please, to the Court.

(Witness places film in illuminator.)

Q. Now generally where was the fracture?

A. Well, this film was taken after the healing process was well under way, and the fracture is roughly in this area.

Q. You say that was taken after the healing process was well along?

A. Yes. This was taken while he was in the rest home on the East Side, as a checkup to note whether healing was sufficient to allow him to get on his feet.

Q. Point out the pin you have mentioned.

(Testimony of Sidney Mayer, Jr.)

A. That is the pin—this heavy white object.

Q. Does that demonstrate its actual size?

A. Yes.

Q. Is that pin still in Mr. Bromberg's hip?

A. Yes.

Q. Will it always be? A. Yes.

Mr. Mautz: I believe that is all on that point.

Q. It has been testified by Mrs. Hervin, Dr. Mayer, that for some time following the accident three special nurses were called for Mr. Bromberg, then for a period two, and then subsequently one. Were those special nurses called under your supervision? A. Yes.

Q. You felt it was necessary for him to have them, did you? [26] A. Yes.

Q. And she has testified, or if she hasn't I perhaps didn't ask her, and I will ask you if the charges they made for their services were at the rate of six dollars per day of eight hours is that the regular charge for special nurses? A. Yes, it is.

Mr. Mautz: Do you have the hospital bill, Mrs. Hervin, of \$272?

Mr. Freed: I won't dispute that.

Mr. Mautz: Well, Mr. Freed will testify——

Mr. Freed: I will admit.

Mr. Mautz: ——will stipulate that that will be the reasonable charge for hospitalization.

Mr. Freed: If that is what you say it is.

Mr. Mautz: Yes. She has the bill, if you would like to see it.

Q. Dr. Mayer, she has testified that your bill

(Testimony of Sidney Mayer, Jr.)

was \$150.00 and that Dr. McKelvey's bill was \$200.00, and Dr. Leon Goldsmith, who attended the plaintiff some years ago called on him once at the hospital and his bill was \$3.50. In your opinion are those charges reasonable charges for the services that were rendered by those three physicians to the plaintiff? A. Yes.

Q. It has been testified here, Doctor, that following this hospitalization he was confined at a convalescent home on the East Side and then because of his own insistence he was permitted to go to a hotel for two or three days to see if he could handle it and [27] it was discovered he couldn't and since that time he has been confined at the Gard Convalescent Home. In your opinion, Doctor, has it been necessary for him to be confined to these convalescent homes since the accident? A. It has.

Q. And Mrs. Hervin has testified about the charges at these homes, that it was originally \$5.00 per day at the East Side convalescent home and then they raised to six, and the charge at the Gard Convalescent Home has been at the rate of \$6.50 per day. Within your knowledge and experience are those the regular and standard charges for institutions of those kinds in this community?

A. I believe they are.

Q. What was the eventual result of Mr. Bromberg's injury? What was the extent of his recovery?

A. I should say that so far as the function of his hip is concerned he has made a 90 per cent recovery.

(Testimony of Sidney Mayer, Jr.)

Q. And he has made, for his age and the consequent brittleness, I suppose, of bones and all, he has made a happy recovery, as far as the way those recoveries sometime go; isn't that true?

A. An unusually good recovery.

Q. An unusually good recovery. And you would say, as far as the actual function of the hip itself, it is probably 90 per cent as good as it was before?

A. Yes.

Q. You perhaps didn't actually weigh him, but judging by the [28] times that you have treated him and been with him and all, give us his approximate height and weight, would you, Doctor.

A. Well, it would be purely a guess. I should say he is five feet five or six inches tall, and weighs probably 130 pounds.

Q. Do you think he weighs that much?

A. That is a guess.

Q. You didn't have an occasion to weigh him, did you?

A. No.

Q. And would his weight be very much different at this time from what it was just before the accident?

A. No, I shouldn't say it is very much different.

Mr. Mautz: You may inquire.

Mr. Freed: No cross examination.

Mr. Mautz: Oh, excuse me.

Q. Mrs. Hervin testified that subsequent to the hospitalization additional X-rays were taken at an expense of \$12.00. Would those be standard and reasonable charges?

A. Yes.

(Testimony of Sidney Mayer, Jr.)

Q. And the charge for the ambulance service that was used for him was \$12.00, and the wheel chair that was used for him cost \$6.00. Are those standard charges for those items?

A. I am not at all familiar with the charge for wheel chair, but the other charges were standard.

Mr. Mautz: That is all, Doctor. Thank you very much.

(Witness excused.) [29]

I. BROMBERG,

the plaintiff, was thereupon produced as a witness in his own behalf and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Mautz:

Q. Mr. Bromberg, how old are you?

A. I am eighty-seven.

Q. And you lived in the Congress Hotel at one time, did you not? A. Yes. [30]

Q. Do you remember the day that you had an accident there? A. Sir?

Q. Do you remember the accident that you had in the Congress Hotel? A. Yes.

Q. Could you tell Judge McColloch here how it happened? A. Yes.

Q. You tell him, please. A. Yes.

The Court: Tell him to tell the reporter.

(Testimony of I. Bromberg.)

Mr. Mautz: Q. You just sit there and tell him how it happened.

A. Just let me think a minute. One day in June, while I lived at the Congress Hotel, I made about my customary trip every day to go downstairs to the counter, to the Clerk, to solicit my daily mail. That day I done the same thing. I went down stairs with this intention, to solicit my mail, if I have any, but I came to the counter of the clerk and I found there a young lady busy with the clerk soliciting her mail, so I waited until she will be—until she will be through. I stood right next to her, waited until she will be through; then it should be me next. Yes. Well now, about—there was something left out about that.

Q. You were waiting for your mail?

A. Well, yes.

Q. You said you were waiting for your mail but this young lady was ahead of you.

A. Yes. [31]

Q. All right. Then what happened?

A. And I stood there near the young lady, waited until it will come my next.

Q. And then what happened? A. Huh?

Q. And then what happened?

A. (After pause): Well, and in a short—well, I told you I stood next to the lady in order to get my next, and—(witness pauses).

Q. Did you have a fall after that?

A. Well—(witness pauses).

Q. Did you have a fall?

(Testimony of I. Bromberg.)

A. Yes. Just a moment.

Q. Oh, surely.

A. Well, I stood near that lady to wait, then she came close to me and just got a hold of my throat and pulled and gave me a forcible push and I fell with my floor—with my back to the floor and I broke my hip.

Q. All right. That is fine.

A. The consequence was after I had broken my hip they had to take me to my room then upstairs, and from my room they had to take me to the hospital and I was operated.

Q. Yes. That is fine.

Mr. Mautz: I want to say, as Mr. Bromberg's attorney, it is not our contention that this young lady took him with her hand. [32]

The Court: Are there any other eye witnesses?

Mr. Mautz: *Now* so far as I know, your Honor. You may inquire.

Mr. Freed: No cross examination.

Mr. Mautz: We will call Miss Genevieve Cline.

GENEVIEVE CLINE

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination [33]

By Mr. Mautz:

Q. Your name is Genevieve Cline?

A. Yes.

(Testimony of Genevieve Cline.)

Q. And how old are you? A. Seventeen.

Q. And in June of 1942 where did you work?

A. I at that time worked for the Western Union Company.

Q. And were you doing work at that time for someone else also?

A. I was working part time at school.

Q. Pardon, please?

A. I was working for the National Youth Movement at school.

Q. Weren't you working for the J. C. Penney Company?

A. Not at that time. I didn't start working for the J. C. Penney Company until January in 1943.

Q. Oh, I see. What were you doing in the Congress Hotel on June 1st, 1942?

A. I had been sent there by the company to either deliver or pick up a telegram, which I don't remember.

Q. You don't recall which? A. No.

Q. Did you have any insignia of any kind of the company on?

A. I don't recall, but I would say I was wearing a Western Union coat.

Q. Coat. However, you were there on the company business, were you? [34]

A. Yes, I was.

Q. That was the only reason you went to the Congress Hotel? A. Yes.

Q. Had you ever been at this hotel before?

A. No. I hadn't.

(Testimony of Genevieve Cline.)

Q. Never had. Where did you go to either pick up or deliver this message for the Western Union Company?

A. I went to the main desk.

Q. And when you finished at the main desk what did you do?

A. Oh, when I finished at the main desk I turned around to leave the hotel.

Q. And where was Mr. Bromberg at that time when you turned around?

A. Well, Mr. Bromberg was behind me and slightly to the side.

Q. About how far from you?

A. Well, I don't know exactly.

Q. Well, just your best judgment?

A. Oh, about two or three steps.

Q. Two or three steps?

A. Something like that.

Q. And then did you start moving away from your position at the desk?

The Court: I will tell you the best way to do that would be to show me. Mr. Joy, you come and stand behind her. You come down here and face like you were facing the desk. You just take any position there, a little further up. About how far behind [35] you? Where should he be?

A. He was a little closer than that, I would say. (Mr. Joy changes his position.) Mostly like that, yes.

The Court: About that way behind you, or a little more to your side?

(Testimony of Genevieve Cline.)

A. Just about like that, yes.

The Court: All right. Thank you.

Mr. Mautz: Q. And then when you moved away from the desk did you start running?

A. No, I didn't.

Q. You started walking? A. Yes.

Q. And was there a contact between you and Mr. Bromberg? You didn't know who the man was, did you? A. No, I didn't.

Q. But you have since found out it was Mr. Bromberg? A. Yes, I have.

Q. Was there a contact between the two of you?

A. I brushed against him.

Q. Now you say you brushed against him. What do you mean by that?

The Court: I want to know, first, whether you knew he was behind you all the time.

A. No, I didn't.

Mr. Mautz: Q. When you were standing at the desk doing your work there you didn't know that he was behind you? [36]

A. No, I didn't.

Q. Then when you turned around you saw him there two or three steps, or whatever the distance was behind you you saw him? You saw him behind you.

A. Well, I knew there was someone there when I brushed against him.

Q. When you turned around and left the desk you didn't close your eyes, did you?

(Testimony of Genevieve Cline.)

A. No.

Q. And as you have told the Court, he was standing almost immediately to your rear; isn't that true? A. That is true.

The Court: Did you realize there was an old gentlemen behind you? A. No, sir.

Mr. Mautz: Q. Did you realize it was a man, other than a woman? A. Well——

Q. Did you see enough of him to realize it was a man and not a woman? A. No.

Q. You didn't?

A. No. I just knew there was some one back—

The Court: Were there other people around there, do you know?

Mr. Mautz: I was just going to ask that, Judge.

Q. Was there anybody else in the vicinity?

A. No. [37]

Q. There wasn't anybody else there, was there?

A. No, sir.

Q. And it is quite a large area there in the lobby? A. Yes.

Q. In other words, there was plenty of room for you to have walked without having any contact with Mr. Bromberg, wasn't there?

A. Yes, there was.

Q. But then in walking away from the desk you did have a contact with him?

A. Yes, I did.

Q. And as a result of that contact he went to the floor, didn't he? A. Yes.

Q. And did you help him up?

(Testimony of Genevieve Cline.)

A. Well, I started to help one of the bell boys pick him up and then another one came to his assistance, so I left the hotel and came to the office.

Q. How many steps, in walking away from the desk how many steps, if any, do you think you took before you bumped into him?

A. Probably one.

Q. Probably one?

The Court: Do you remember whether you turned to the right or to the left?

A. No, I don't. [38]

The Court: You were through and were going out the door? That was your idea?

A. Yes.

Mr. Mautz: Q. And in addition to no people being around there there was no post or pillar right there in the vicinity that you were trying to avoid, was there? A. No, sir.

The Court: You say there were no eye witnesses. Didn't the Clerk see it.

Mr. Mautz: Nobody seemed to. Well, there were different ones around, the clerk, bell hops who saw things immediately afterwards, and who didn't see the actual impact, as I understand.

The Court: Who was the Clerk? She had been there talking to the Clerk.

Mr. Mautz: Who was that Clerk?

A. Well, I found out afterwards that the Clerk on duty was—I believe his name was Mr. Shelton.

Mr. Mautz: Mr. Shelton.

The Court: I don't see how it could happen

(Testimony of Genevieve Cline.)

without the Clerk seeing it. She was talking to the Clerk.

Mr. Mautz: Apparently, as I get it, your Honor, maybe Mr. Shelton is being brought here by Mr. Freed.

Mr. Freed: No.

Mr. Mautz: As I understand, after he had finished his business with this young lady he turned himself to do some other business [39] behind the desk. In other words, I haven't talked to him personally but I have seen a statement he gave a third party yet from either of us. That is the reason, I presume, neither of us has called him. He seemed to know nothing about it because he turned around.

The Court: Did he know Mr. Bromberg was there also?

Mr. Mautz: That I don't know.

Q. Now what, if any, statement did you make to Mr. Bromberg right afterwards?

A. Well, when I went to help the bell hop pick him up I told him I was sorry that I brushed against him.

Q. Now, Genevieve, didn't you tell him you were sorry that you knocked him down?

A. I don't know. I may have.

Q. You may have told him that. Uh huh. As a matter of fact, you did bump into him, didn't you?

A. Well, either bumped into him or brushed against him.

Mr. Mautz: Could I have the plaintiff's sealed exhibit?

(Testimony of Genevieve Cline.)

The Clerk: They haven't been opened yet.

Mr. Mautz: Is it permissible for me to open them?

The Court: Yes. Have you seen it, Mr. Freed?

Mr. Freed: I haven't.

Mr. Mautz: Well, this is a copy, if the Court please, of the witness' statement, the original of which was not in the city at the time that we had our pre-trial but the original of which is [40] now available and is under subpoena.

Mr. Freed: If this is a copy I won't object because you don't have the original.

Mr. Mautz: The original is available. I can get it if you want it.

Mr. Freed: Whatever you say. I won't require that expense. I am concerned if the witness recognizes it.

Mr. Mautz: Q. Genevieve, shortly after the accident happened a representative of the Congress Hotel got in touch with you and took your statement; is that not true?

A. That is true.

Q. They asked you what happened, you told them, they wrote it down and you signed it?

A. Yes.

Q. Would you read that copy, please, to see if that seems to be about what you remember you signed (passing paper to witness.)

A. Yes.

Mr. Freed: Well then, we make no objection.

Mr. Mautz: We will offer it in evidence.

The Court: What does it say? Read it.

(Testimony of Genevieve Cline.)

Mr. Mautz: I was just going to read it as soon as it was marked.

The Court: Read it first.

Mr. Mautz: "Genevieve Cline, residing at 2013 Northeast Fifty-eighth Street, Portland, Oregon, says: [41]

"That on June 1st, 1942, at about 3:30 P. M., I was in the lobby of the Congress Hotel in Portland. I was at the lobby desk and was either delivering or picking up a telegram. Upon turning around to leave I bumped into an old man near the desk. He fell down and I helped a bell boy pick him up. I told him I was sorry and then left the hotel. I did not realize he had been injured.

"I have read the above and it is true.

June 26, 1942."

Signed "Genevieve Cline."

(Reporter's Note: See pages 49 and 50 of this transcript where Mr. Mautz further offered the above statement and the Court reserved ruling.)

Q. Now in that statement taken just twenty-five or twenty-six days after the accident you did say at the time that you bumped into him and he fell down? A. Yes.

The Court: I wish you would tell me where you got that expression you used, you brushed into him. Did somebody tell you to say that? A. No.

The Court: You went to High School, didn't you?

(Testimony of Genevieve Cline.)

A. Yes. I am going to High School at the present time.

Mr. Mautz: Q. And I believe you say, Genevieve, that you don't recall now whether you told him immediately afterwards that you [42] were sorry that you knocked him down, or not?

A. No, I don't.

Q. You won't say that you didn't say that?

A. I won't say that I didn't.

Mr. Mautz: That is all.

Cross Examination

By Mr. Freed:

Q. When did you first realize that anybody, Mr. Bromberg, a man, or woman or child, or anybody was near you, back of you or to the side of you in the lobby?

A. Well, at the time I either brushed against or bumped into him.

Q. When you came in contact with him?

A. Yes.

Q. Up to that time you had not realized that anybody was there? A. No.

Q. Now whether we call it bumped into, as Mr. Mautz does, or brushed, as you have from the stand, tell the Judge what did happen. I mean, what was the contact? Where did you strike, if you remember what portion you struck, what part of Mr. Bromberg, and how hard?

The Court: With Mr. Joy there could you show just how it happened.

(Testimony of Genevieve Cline.)

Mr. Mautz: Mr. Joy won't mind. He is hard.

The Witness: No; it is perfectly all right.

Mr. Freed: He wants to know what you mean by brushing into [43] him.

The Witness: I can't tell which side it was.

The Court: Get away. She will have a little more room.

Mr. Freed: Your Honor understands she doesn't know which way she turned.

The Court: I understand. She told me that. What I want to know is about how hard you bumped into him. Show me that.

The Witness: I should say more or less like that (illustrating).

The Court: With your head turned away from him, you think? A. Probably.

Mr. Freed: Q. Now when did you tell Mr. Bromberg that you were sorry; at the time that you came in contact with him or afterwards when you started to pick him up?

A. Afterwards when I started to pick him up.

Q. And at this time do you remember just what words you used? A. No, I don't.

Q. And the statements that you have made here on the witness stand represent your own idea of what happened there? A. Yes.

Q. And you have never at any time intended to say anything different in any statement given to anybody?

Mr. Mautz: We will object, if the Court please.

(Testimony of Genevieve Cline.)

The statements that she gave earlier speak for themselves.

The Court: She may answer.

Mr. Freed: Do you understand my question?

[44]

The Witness: No, I don't.

Mr. Freed: Would you please read it.

(Last question read.)

A. No.

The Court: Were you in a hurry for any reason?

A. No, I wasn't.

Mr. Freed: That is all I have to ask you.

Re-Direct Examination

By Mr. Mautz:

Q. Genevieve, how do you know you were not in a hurry? In connection with your work as a Western Union messenger you occasionally are in a hurry, aren't you?

A. Well, occasionally, yes. But I remember that well. It was soon after I started there and Miss Brugman was telling me—she said that “Even if your telegram is marked ‘Rush’ never bother to run because you might meet up with an accident.”

Q. That was after this accident you were told that?

A. No. That was before. It was one rainy day she told me that.

Q. She told you not to run, but that doesn't mean you might not be in a hurry, does it?

(Testimony of Genevieve Cline.)

A. Well, no. But I mean usually people walking fast are on the verge of running.

Q. In your work for the Western Union delivering messages you never have even walked fast?

A. Yes, I have sometimes walked fast. [45]

Q. And you are sometimes in a hurry?

A. Yes, sometimes.

Q. And on this particular occasion you don't remember what the nature of your duties was; that is, what you were doing at the time? A. No.

Mr. Mautz: That is all.

The Court: How long had you been working for the company? A. At that time?

The Court: Yes.

A. Approximately——

The Court: That was June 1st.

A. Oh, about twenty-four days. It was not quite a month.

The Court: Had you ever done messenger work of any kind before? A. No, I hadn't.

The Court: What office were you coming from or were you going to?

A. I was at the office in the Pacific Building.

The Court: You had come up from there to the hotel? A. Yes.

The Court: Had walked up?

A. Yes.

The Court: Went through those swinging doors?

A. Yes. [46]

The Court: Up to the desk, and were going away? A. Yes.

(Testimony of Genevieve Cline.)

The Court: Do you remember anything about the day, what kind of a day it was?

A. Yes, I do. It was a nice day. I mean——

The Court: Nice summer day?

A. Spring day.

The Court: The first of June? A. Yes.

The Court: All right, gentlemen.

Mr. Mautz: That is all.

(Witness excused.)

Mr. Mautz: We will call Mr. Goss.

The Clerk: State your full name now.

Mr. Goss: John Goss.

JOHN GOSS

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Mautz:

Q. Your name is Jack Goss? A. Yes.

Q. Mr. Goss, were you on June 1st, 1942, working for the Congress Hotel as a bellhop? [47]

A. Yes, I believe so.

Q. And were you in the lobby of the hotel at the time this accident happened? A. Yes.

Q. What, if anything, did you hear Miss Cline say to Mr. Bromberg immediately after the accident?

(Testimony of John Goss.)

A. Well, she brushed against him and she said—

Q. I didn't ask you that, please. I asked you to testify what you heard her say immediately after the accident.

A. Well, "I'm sorry for knocking you down."

Q. I beg your pardon?

A. "I am sorry for knocking you down."

Mr. Mautz: You may inquire.

Cross Examination

By Mr. Freed:

Q. What did you say about brushing into him?

A. I was using her words.

Q. You didn't see the accident?

A. Not actually.

Q. You didn't see the happening?

A. No.

Q. You were not an eye witness to it, in other words? A. Not an eye witness.

Q. Was Mr. Bromberg on the floor when the messenger made the statement to him, or had he been helped up, or when was it, Mr. Goss? [48]

A. I beg your pardon?

Q. When did she make this statement to Mr. Bromberg.

A. Mr. Bromberg was on the floor on his back and I was helping him up, and she says, "I am sorry for knocking you down."

Q. Said it to him or to you?

A. To him.

Q. "I am sorry for knocking you down"?

A. Yes.

(Testimony of John Goss.)

Q. That was her words? Did she say anything else?

A. No. She went out.

Mr. Freed: No further questions.

Mr. Mautz: That is all. Thank you, Mr. Goss. You are free to go, now.

(Witness excused.) [49]

Mr. Mautz: If the Court please, I don't want any question about this and I will withdraw the original statement and confine my offer merely to the X-rays and to the original answer.

The Court: They will be admitted.

(The ten X-rays so offered and received, having been previously marked Plaintiff's Pre-Trial Exhibits 1 to 8, both inclusive, and Plaintiff's Pre-Trial Exhibits 11 and 12, were further marked "and trial," and the original answer of the defendant so offered and received, having been previously marked Plaintiff's Pre-Trial Exhibit 16, was further marked "and trial".)

PLAINTIFF'S PRE-TRIAL AND TRIAL
EXHIBIT No. 16

In the District Court of the United States for the
District of Oregon

Civ. 1389

I. BROMBERG,

Plaintiff

vs.

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Defendant.

ANSWER

Defendant answers the complaint as follows:

I.

Admits the allegations of paragraph I.

II

Answering paragraph II, admits that portion thereof down to and including the word "mail" in line 1 on page 2; and denies the remainder of said paragraph.

III

Denies the allegations of paragraph III.

IV

Answering paragraph IV states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph, and therefore denies the same.

V

Admits the allegations of paragraph V.

Wherefore defendant prays that plaintiff take nothing by his complaint and that defendant have judgment for its costs and disbursements.

SIMON, GEARIN, HUMPH-
REYS AND FREED
EDGAR FREED

Attorneys for Defendant
1111 Failing Building
Portland, Oregon

State of Oregon

County of Multnomah—ss

Due service of the within answer is hereby accepted in Multnomah County, Oregon this 13th day of October, 1942, by receiving a copy thereof, duly certified to as such by Edgar Freed of Attorneys for Defendant.

WILBUR, BECKETT, HOW-
ELL & OPPENHEIMER
Attorney for Plaintiff

United States of America

District of Oregon—ss:

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of Answer (Exhibit 16) in cause No. Civ. 1389, I. Bromberg vs. Western Union Telegraph Co. a corporation, has been by me compared with the original thereof, and

that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this August 30, 1943.

(Seal) LOWELL MUNDORFF

Clerk,

By F. I. Buck

Chief Deputy Clerk

[Endorsed]: Filed October 13, 1942.

Mr. Mautz: That is all. Plaintiff rests.

Mr. Freed: I don't know whether I can ask the Court, sitting as a tryer of the law as well as sitting as a jury, in other words, whether the procedure is to ask you to direct a verdict, but that is what I wish to present at this time. [51]

The Court: We understand—whatever the theory is it doesn't make any difference—the motion is to dismiss the action at this time?

Mr. Freed: At this time, and if a jury were here it would be a motion to direct a verdict. I don't think the rules of practice specifically define what is to be done, and I wish to state my grounds only; then if your Honor does not wish to hear more I will submit it.

The grounds are that there has been no negligence shown—no negligence of the messenger girl has been shown. It is shown that Mr. Bromberg was contributorily negligent under the situation, with his limited faculties and facilities, in placing himself where he

did, and that that proximately caused the accident.

Then another point that I wish to make, at least for the record, another ground is, that even if the girl were negligent and Mr. Bromberg was not contributorily negligent the rule of respondeat superior does not apply in this case, because the messenger girl was at a place where she had a right to be on her own account and not through permission of the Western Union. She was there as a citizen—it was a public place—in the exercise of one of her rights. She was not using any instrument or vehicle furnished by her employer. And I just wish to add to your Honor that I have at least two cases that uphold me there, and there are cases that dispute that, and I have to state my grounds.

And, thirdly, it is my understanding that you must have [52] some theory—or fourthly, or whatever it is—you must have some theory of the case, and the evidence here, so far as Mr. Bromberg testified, is that the girl turned around and came into him with her hands and shoved him over. The complaint and the pre-trial order, and apparently counsel's theory, seem to be that it was she bumped into him as an accidental thing entirely.

My last ground is that even if she were negligent, in other words, if she spun around, let us say, that neither she nor the Western Union—I mention that because it is not a question of their not being responsible on this point—the Western Union would not be liable unless she could have reasonably foreseen that injury would result from that act. A person is not responsible for everything that results, even directly, from their acts, even though their acts

might even be classed as negligent. There must be two things: They must be able to foresee that an injurious result would follow—I said I would not argue it unless your Honor asked me to, so I simply state those points.

The Court: I will reserve decision at this time. I will hear you fully again on all the case. [53]

DEFENDANT'S EVIDENCE

JAMES LENHART

was thereupon produced as a witness in behalf of the defendant and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Freed:

Q. Your name is James Lenhart?

A. That is right.

Q. You live here in Portland?

A. Yes, sir.

Q. What is your business now?

A. I am working in the ship yards.

Q. What shipyard? A. Albina.

Q. What was your occupation on June 1st, 1942?

A. I was head bell man and relief clerk at the Congress Hotel.

Q. That is in Portland here? A. Yes, sir.

Q. And when did you stop working for the Congress Hotel? A. August 26th, 1942.

Q. Did you go from there to the shipyards?

A. Yes, sir; at Vancouver.

(Testimony of James Lenhart.)

Q. And you left the employ of the hotel to go to the shipyards to work? A. Yes, sir. [54]

Q. How long have you lived in Portland?

A. I have been here since 1936.

Q. Now you say that you were head bell man at the Congress Hotel and relief clerk on June 1st 1942?

A. Yes, sir.

Q. Do you remember an incident on or about that date when Mr. Bromberg fell to the floor in the lobby of the Congress? A. Yes, sir, I do.

Q. Were you in the lobby at that time?

A. I was.

Q. Were you on duty?

A. I had just gone off duty.

Q. Well, what were you doing in the lobby?

A. It was payday and I was passing out the pay envelopes.

Q. I didn't hear the last.

A. It was payday and I was passing out the pay envelopes.

Q. Well, where were you standing when the accident took place? A. By the elevator.

Q. In the lobby of the hotel? A. Yes, sir.

Q. Did you see a Western Union messenger girl in the lobby at that time? A. I did.

Q. Where was she standing when you first saw her? A. In front of the desk. [55]

Q. At the main desk there in the lobby?

A. At the main desk in the lobby of the hotel.

Q. You knew Mr. Bromberg, the plaintiff in this case, didn't you? A. Yes, I did.

(Testimony of James Lenhart.)

Q. Was he a regular guest at the hotel then?

A. Yes, a permanent guest then.

Q. You saw Mr. Bromberg fall to the floor, did you? A. I did.

Q. Well, will you tell the Court what you saw at that time from the time you saw the Western Union messenger girl standing at the desk.

A. Well, I was standing by the elevator as Mr. Bromberg come out of the elevator and the girl was standing in front of the desk, and he shuffled from the elevator over and stood behind the girl I should say about three feet behind her and just a little bit to the right.

Q. Did he come out of the elevator?

A. Yes, he came out of the elevator kind of between, just a little bit to the right of her, kind of between her and the doorway, and he stood there, and she turned I am sure to her left and kind of made a circle around him.

Mr. Mautz: Just a minute. If the Court please, he says he is sure. I would like to find out before he tells his story if he saw this.

The Witness: Yes, sir. [56]

The Court: Is this a surprise to you?

Mr. Mautz: Well, what he is saying is a surprise.

The Court: Go ahead.

The Witness: She turned and went around behind him and at that time she was between Mr. Bromberg and myself. Now she might have brushed him but if she did it was very lightly, because she went on right by him and he fell and she stopped, and

(Testimony of James Lenhart.)

as he fell he said something, "Help", or "I am hurt", or something; just what his words were I don't know; and she stopped and rushed back to help him, and at the same time I rushed over to help him up, and if she said anything to him I didn't hear it. Then the minute we got there and started helping him up she went on out the door, and then we helped him up. First we put him on a settee in the lobby, and we seen he was pretty badly hurt, then we took him to his room.

Q. Then when she passed Mr. Bromberg, when she was leaving the desk, she would pass between him and you? A. That is right.

Q. Would that be it?

A. She passed between Mr. Romberg and myself. She kind of circled around behind Mr. Romberg in turning.

Q. You saw her pass Mr. Romberg?

A. I did.

Q. Were you aware that she came in contact with him? A. At the time, no. [57]

Q. You were in the court room this morning?

A. I was.

Q. You heard the testimony here this morning?

A. I did.

Q. And when did you learn that she did come in contact with him?

A. This morning. Well, that she actually bumped into him.

Q. From your vision, from your view there, you didn't see her actually strike him?

A. I did not.

(Testimony of James Lenhart.)

Q. And you were looking at them?

A. I was looking at them at the time.

Mr. Freed: You may take the witness.

Cross Examination

By Mr. Mautz:

Q. Mr. Lenhart, there where Mr. Bromberg was standing just before his fall were there any bags of carpet or turned-up linoleum, or anything else over which a person could have fallen? A. No, sir.

Q. Perfectly smooth floor, wasn't it?

A. It was, and dry.

Q. Yes. No obstruction or anything to trip at all?

A. No.

Q. Now as I understand your story, Mr. Bromberg came down, got out of the elevator, and walked over—I believe you used the word “shuffled”? [58]

A. That is right.

Q. And stood approximately three feet to the rear and a little to the side of this young lady?

A. That is right.

Q. You saw him do that? A. I did.

Q. You saw her at the desk? A. I did.

Q. You did. You said you saw the Western Union messenger. How did you know she was a Western Union messenger?

A. She had on a Western Union coat.

Q. She had on a Western Union coat. Did you know her otherwise? A. No.

Q. And then you watched and she turned around from the desk and walked around Mr. Bromberg in sort of a circular—

(Testimony of James Lenhart.)

Q. She kind of circled around behind him.

Q. —manner? A. Uh huh.

Q. And then some time after she was between you and Mr. Bromberg he fell to the floor?

A. That is right.

Q. How close was she to him at that moment?

A. When he fell?

Q. Yes.

A. She was quite a ways. I would says she was ten feet past him when he fell. She was ten feet. [59]

Q. She circled around him. She had passed him?

A. At least ten feet.

Q. And you saw this whole thing?

A. I did.

Q. From the start to the finish? A. I did.

Q. Your statement was taken after this accident happened, too, wasn't it? A. That is right.

Mr. Mautz: Would you hand the witness—will you have that marked first, please.

Mr. Freed: Is that one of the impeaching documents?

The Court: Has he seen that?

Mr. Freed: No.

The Court: Is this one that was sealed?

Mr. Mautz: No.

The Court: No, it was not sealed.

Mr. Freed: Well, can he use that, your Honor.

Mr. Mautz: I am certainly going to ask the Court's permission to use it.

Mr. Freed: I haven't seen it yet.

Mr. Mautz: You have got a copy of it, Mr. Freed.

(Testimony of James Lenhart.)

Mr. Freed: Well, I haven't seen that.

Mr. Mautz: Well, you will see it.

The Court: Mark it for identification. [60]

(The Statement of James H. Lenhart was thereupon marked Plaintiff's Exhibit 17 for identification.)

Mr. Mautz: Q. Mr. Lenhart, after this accident happened a representative of the Congress Hotel came to you and took your statement in this matter, did he not? A. Yes.

Q. And you told him what had happened and he wrote it down and you signed it?

A. That is right.

Mr. Mautz: Will you hand the witness——

Mr. Freed: Wait just a minute. Your Honor——

Mr. Mautz: Would you hand the witness, please, the exhibit. [61]

Mr. Mautz: Q. That appears to be a copy of the statement you signed, Mr. Lenhart?

The Witness: Wait until I get it read over. (Witness peruses paper.) That is the statement.

Mr. Mautz: We will offer in evidence Plaintiff's Exhibit 17 for identification. [65]

The Court: It is admitted.

(The statement of James H. Lenhart, so offered and received, having been previously marked Plaintiff's Exhibit 17 for identification, was marked received.)

The Court: I wish you would read it now.

Mr. Mautz: Yes. "Jim Lenhart, residing at 1615 North Simpton, Portland, Oregon, says:

(Testimony of James Lenhart.)

“On June 1st, 1942, at about 3:20 P. M., I was in the lobby of the Congress Hotel in Portland, where I am employed as head bellman. I was standing near the elevator and turned around just in time to see a Mr. Bromberg who lives at the hotel in the act of falling to the floor near the desk. There was a young Western Union messenger girl standing alongside of him and she was the first one to make any effort to help him. I then went over and with the help of Jack Goss, one of the bell boys, helped him to a settee in the lobby. The Western Union girl then went on her way and left the building. She said nothing to anyone but left right away. Later we took Mr. Bromberg to his room.

“The floor in the lobby where this accident occurred is covered with linoleum, was in good repair and was clean and dry. There was no object either bags, carpets or turned up linoleum over which anyone could have fallen.

“I have read the above and it is true.

“June 12th, 1942.

Signed “James H. Lenhart”. [66]

Q. Now that statement was taken from you about eleven days after the accident, wasn't it?

A. That is right.

Q. And at that time you told the person who contacted you, and you signed it after having said you had read it and “it is true”, that you were facing the elevator and you turned around in time to see Mr. Bromberg in the act of falling?

A. That is right.

(Testimony of James Lenhart.)

Q. And at that time the Western Union girl was standing alongside of him?

A. I also saw it before that time, too.

Q. You didn't say anything in here about it.

A. They didn't ask me to say anything about it.

Q. If you were facing the elevator, and if you turned around and saw him in the act of falling, as you say here—and that is true, isn't it?

A. I did see him fall, yes. That is what they wanted to know.

Q. All right; then how could you have been looking, as you told the Court here under oath, how could you have been looking and watching this entire episode from the time he went off the elevator and went down and stood three feet behind her and you saw her turn around, walk around him and get behind him and then saw him fall down when she was ten feet beyond him, and you say you saw all of that continuously—how do you reconcile this with your written statement that you turned around and you saw him in [67] the act of falling and her standing behind him? Tell the Court how you reconcile those statements.

A. I saw Mr. Bromberg walk across the floor and I turned around a moment. Definitely I must have turned around to the elevator and then turned back, because I saw her leave the desk and turn around him. In that statement they didn't ask me. All that they were interested in was what caused him to fall.

The Court: Who wrote this?

A. This representative of the Aetna Life Insurance Company.

(Testimony of James Lenhart.)

The Court: Where was he when he wrote it up?

A. In the lobby of the Congress Hotel.

The Court: Did he write it up with a pen?

A. I am pretty sure he did. I am not too positive whether he used a pencil or pen.

The Court: You didn't write it out?

A. No; I signed it.

The Court: Who else was there besides you and the Aetna man?

A. Just he and I.

The Court: None of your employers at the Congress?

A. You mean were present at the time?

The Court: Well, at the time he had the talk which resulted in that being written up.

A. No. Just he and I were there when we had the talk.

The Court: When you had the talk?

A. That is right, sir. [68]

The Court: Who introduced him to you?

A. Well——

The Court: Well, he was taking other statements at the time?

A. Yes. He was in the hotel at the time. I think it was the Clerk, but I am not too positive.

Mr. Mautz: Shall I continue, your Honor?

The Court: Yes.

Mr. Mautz: I have no other questions, except I would like to say the original statement is now in the city, if your Honor would like to see the form of it.

(Testimony of James Lenhart.)

The Court: No doubt that is the way it was done.

Mr. Mautz: This is an exact copy of it.

Mr. Freed: I make no objection because it is not the original.

Mr. Mautz: That is all.

Re-direct Examination

By Mr. Freed:

Q. Mr. Lenhart, the statement that you have made on the stand here as to how the accident happened is true, isn't it? A. Yes, sir.

Q. That is a true statement?

A. That is a true statement.

Q. And by anything that you said in this statement that you gave to the Aetna you did not mean to contradict the version that you have given on the stand, did you? A. I did not.

Mr. Freed: That is all. [69]

Re-cross Examination

By Mr. Mautz:

Q. You didn't even hear Miss Cline say she was sorry, either that she brushed into him, as she suggests, or that she knocked him down, as Mr. Goss says? A. If she said that I didn't hear her.

Mr. Mautz: Yes. That is all.

The Court: I just want to ask a few questions more.

The Witness: Yes.

The Court: You have been around the Congress a good while, haven't you?

A. Well, I was there just a little over a year at the Congress.

(Testimony of James Lenhart.)

The Court: And what is your age?

A. I am twenty-seven.

The Court: Are you married?

A. Yes, sir.

The Court: Got children?

A. Yes, sir.

The Court: Where do you live in Portland?

A. 1615 North Simpson.

The Court: How long did you work for the hotel?

A. I have been working in hotels since May 1st, 1937.

The Court: Around Portland?

A. Well, all but six months out of that time I worked for a hotel in Klamath Falls. [70]

The Court: '37?

A. I worked at the Roosevelt Hotel from May 1st, 1937, until in May, 1940, and I was in the insurance business ten months, then in a hotel at Klamath Falls for six months, then I went to the Congress and was there until I went in the shipyards.

The Court: That is all.

Mr. Mautz: I don't know now, your Honor—I am taken by surprise, frankly, on this, and I want to ask a foundation question. Possibly I can't bear it out any more than this statement does, but I would like to ask it. I will see what I can do during the noon hour.

Q. Mr. Lenhart, at the time that this statement was taken by an insurance representative in the Congress Hotel on June 12th, I think it is, 1942, isn't it a fact that you told him that you were facing the

(Testimony of James Lenhart.)

elevator and you turned and saw Mr. Bromberg in the act of falling and the Western Union girl standing alongside of him, and that is all you had seen about the accident and all you knew about it?

A. I didn't say anything in there that isn't true. That is all true.

The Court: He is asking you—I think you ought to have this in mind: He is going to talk with the investigator during the noon hour.

The Witness: Uh huh.

The Court: To see if you told the investigator that this is [71] all you knew about the accident and all that you saw.

The Witness: Uh huh.

The Court: That is the question he is asking you now, whether you told the investigator that.

A. Uh huh.

The Court: That statement doesn't say that, but he is asking you whether you told him, the investigator, that?

The Witness: I wouldn't swear to it.

Mr. Mautz: Q. You wouldn't swear to it?

A. I wouldn't; no.

Q. In other words, on June 12, 1942, when he was taking your statement as to what happened you may have told the investigator that what was stated in that statement was all that you know; is that so?

A. If he asked me I might have.

Mr. Mautz: You might have. I see. Well, that is all.

The Court: Is the investigator here, Mr. Mautz?

(Testimony of James Lenhart.)

Mr. Mautz: That I am going to try to find out.

The Court: Is he in the court room now?

Mr. Mautz: No. I am going to try to find out as soon as we adjourn.

Re-direct Examination

By Mr. Freed:

Q. The testimony you have given on the stand as to what you saw was true? That is so, is it? [72]

A. That is right.

The Court: Of course, if you told me the investigator what is in that statement is all that you know about it, you realize that is inconsistent with what you have said here this morning?

A. I realize it if I said that. The time that was made out the thing that was important, the thing we were after was that he didn't slip on a slippery floor, or something like that.

The Court: You were trying to protect the hotel?

A. Not necessarily.

The Court: I mean, that is what the inquiry was about?

A. That is what it was about; yes, sir.

Re-cross Examination

By Mr. Mautz:

Q. And there was nothing about the floor, or the slipperiness of the floor, or obstacles, or anything else that required him to fall, or caused him to fall?

A. Nothing—wait a minute. Let me get that straight. You mean there was nothing on the floor that caused him to fall?

(Testimony of James Lenhart.)

Q. Yes. A. Nothing at all.

The Court: The Navy has asked me to have a brief hearing here at 1:30. Probably it will be quarter to two before we can start.

Mr. Mautz: I wonder if the Court would excuse Mr. Bromberg this afternoon?

The Court: Oh, yes. Or we can go on now, if you want to. [73]

Mr. Freed: I didn't look at the clock. That is all.

The Court: There has been too much excitement. Step down.

(Witness excused.)

(At this point, 12:05 o'clock P. M., a recess was taken herein and at 2:45 o'clock P. M., proceedings were resumed herein as follows:)

Mr. Freed: I think I was in the defendant's case. I have forgotten, we were talking, but I guess you had closed your cross-examination.

Mr. Mautz: Yes.

Mr. Freed: I want to offer in evidence the plaintiff's deposition, and that was Pre-Trial Exhibit No. 14.

Mr. Mautz: No objection.

The Court: It is admitted.

(The deposition of I. Bromberg, the plaintiff, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 14, was further marked "and trial".)

DEFENDANT'S PRE-TRIAL AND TRIAL
EXHIBIT NO. 14

In the District Court of the United States
for the District of Oregon

Civil No. 1389

I. BROMBERG,

Plaintiff,

vs.

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Defendant.

Portland, Oregon, December 7, 1942.
10:20 O'clock A.M.

Be It Remembered That, pursuant to the stipulation hereinafter set out, the deposition of I. Bromberg, the plaintiff above named, was taken before Edwin L. Holmes, a Notary Public for Oregon, on Monday, December 7, 1942, at the library of the United States Court House, in the City of Portland, County of Multnomah, State of Oregon.

Appearances:

For the Plaintiff:

Mr. Robert T. Mautz.

For the Defendant:

Mr. Edgar Freed.

Defendant's Pre-Trial and Trial
Exhibit No. 14—(Continued)

(It was stipulated and agreed by and between the attorneys for the respective parties that the deposition [1*] of the above named plaintiff may be taken by the defendant as an adverse party at the library of the United States Court House, in the City of Portland, County of Multnomah, State of Oregon, on Monday, December 7, 1942, at the hour of 10:20 o'clock A.M., before Edwin L. Holmes, a Notary Public for Oregon.

It was further stipulated that the deposition, when written up, may be read in evidence by either party on the trial of the clause.

It was further stipulated that all objections as to the notice of the time and place of taking the deposition are waived, that all objections as to the form of the questions are waived unless objected to at the time the questions are asked, and that all other objections, including objections as to materiality, relevancy, and competency of the testimony, are reserved to all parties until the time of trial.

It was further stipulated that the reading over of the testimony to or by the witness and the signing thereof are expressly waived.)

I. BROMBERG,

the plaintiff herein, being first duly sworn by the Notary to tell the truth, the whole truth, [2] and nothing but the truth, was thereupon examined and testified as follows:

*—Page numbering appearing at top of page of deposition.

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

Examination by Mr. Freed:

Mr. Mautz: I have no objection to your being sure that Mr. Bromberg hears the question.

Mr. Freed: Oh, sure.

Q. Mr. Bromberg, if I don't talk loud enough——

A. (Interrupting) I am a little hard of hearing.

Q. If I don't talk loud enough or if you don't understand what I say then please ask me.

A. All right.

Q. You are the plaintiff in an action entitled I. Bromberg against the Western Union Telegraph Company which is pending in the Federal Court here?

A. Yes.

Q. How old are you, Mr. Bromberg?

A. Eighty-seven.

Q. Do you know how much, approximately, you weigh?

A. No.

Q. You don't know that?

A. I haven't weighed myself, because I was always sick. I didn't weigh myself for a long time.

Q. Then you would not know about what you weighed on March 1st of this year?

A. No, I don't. [3]

Q. Can you tell me what the condition of your health was prior to this accident at the Congress Hotel on March 1st of this year—your general health?

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

Mr. Mautz: Before the fall.

Mr. Freed: Before you fell.

A. Before I fell?

Q. Yes. A. Pretty fair; good.

Q. Had you been attended by a doctor before that?
A. Yes, I had a doctor.

Q. You were under the attention of a doctor at that time, that, is before you fell?

A. Before the fall?

Q. Yes, sir. A. No.

Q. You were living at the Congress Hotel, weren't you?
A. Yes, sir.

Q. How long had you lived there, Mr. Bromberg?

A. At the Congress Hotel? I lived quite a few years there.

Q. Did you live alone there or did someone stay with you?
A. Yes.

Q. Alone?

A. Yes, alone. I occupied my own room.

Q. Now you said that you had not weighed yourself in a long time because you had been ill. [4]

A. Yes.

Q. Now what kind of illness was that?

A. What?

Q. What kind of illness? What was the matter with you? You said you had been ill. What was the matter with you?

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

A. That wasn't why I didn't weigh myself. I didn't care to be weighed, not on account of illness.

Q. No, but you spoke of being ill, and I am asking you what that illness was.

A. You want to know the time?

Q. Yes. A. In connection with what?

Q. Before this fall, before the time that you fell in the Congress Hotel, when was the last time before that that you were ill?

A. I can't tell what time.

Q. You were not ill at that time, however, were you? A. Not at that time, no.

Q. Had you ever had any falls before this one on March 1st in the Congress Hotel?

A. Oh, certainly, I am a living man and sometimes I fall.

Mr. Mautz: Edgar, excuse me. You keep referring to March 1st. Isn't it June 1st that we are concerned with?

Mr. Freed: Excuse me.

Q. When I have been referring to March 1st, 1942, I find that I was in error. The fall was on June 1st, 1942, and I meant to [5] refer to June 1st. When was the last time prior to June 1st 1942—that is the day when you had this fall in the Congress Hotel—that you had had a fall?

A. I can't remember the time when I fell.

Q. Was it a long time before June 1st of this year? A. A long time what?

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

Q. Was the last fall that you had before the fall that is the subject of this action here a long time before June 1st of this year? You say you don't remember exactly when it was. Was it a long time before June 1st of this year?

A. Do you mean that I had another fall before this?

Q. Yes. A. I don't remember.

Q. Then you don't remember of having any other falls except this one?

A. No. I might have had a fall, but I never paid much attention to it.

Q. Have you ever had any fainting spells?

A. Any what?

Q. Any fainting spells?

A. No. Through my life it may happen, but——

Q. (Interrupting) I mean in the last few years.

A. No.

Q. Mr. Bromberg, will you tell me how that accident happened, that fall happened, in the Congress Hotel on June 1st of this [6] year?

A. You mean the way I fell?

Q. How it happened, yes.

A. To what time do you refer?

Q. To the time that you fell in the Congress Hotel on June 1st of this year, the fall that is the subject of this action here, this lawsuit. I am asking you to tell me how it happened.

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

A. I can't remember exactly how it happened. Do you refer to the last fall?

Q. Yes, sir, the one that is the subject of this lawsuit.

A. Let me see. I can't remember the date of it.

Q. Well, it was on June 1st, I believe, of this year.

A. On June 1st, yes.

(A short discussion was then had by the attorneys, off the record.)

Q. (By Mr. Freed) Mr. Bromberg, you say you don't remember how it happened, and I am going to ask your attorney to ask you a question or so to see if he can make it clear to you as to what I am seeking.

A. When?

Mr. Mautz: Mr. Bromberg, you remember when you had your fall in the Congress Hotel there while you were waiting for your mail?

A. When I had my fall, yes. [7]

Mr. Mautz: At the Congress Hotel.

A. Yes, but I can't remember the date.

Mr. Mautz: Forget the date; we know what the date is. Just tell us what happened, what you were doing, and where you were standing, and just tell us how it happened, please. Never mind the date; just tell us what happened there at that time.

A. When I fell at the Congress Hotel?

Mr. Mautz: Yes.

A. I don't know exactly how I fell.

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

Mr. Mautz: Do you remember Saturday morning I came up to you and talked to you in your room up at the rest home? A. No.

Mr. Mautz: You don't remember my talking to you Saturday morning up there in your room up at the convalescent home?

A. Maybe you do. I don't remember much about talking to you.

Mr. Mautz: And you told me how the accident happened when I was there Saturday morning. Now do you remember about your fall at the Congress? You remember about it, don't you?

A. Because of the young girl. She gave me a push and threw me to the floor.

Mr. Mautz: And what were you doing at the time?

Mr. Freed: I would like to proceed.

Mr. Mautz: Yes, you can ask any questions. What were you doing at the time just before the fall? [8]

A. What I was doing?

Mr. Mautz: Yes.

A. I wasn't doing anything. How do you mean?

Mr. Mautz: Well, were you sitting down or standing up? Were you in the restaurant, or in the lobby, or where were you?

A. I was standing by the counter.

Mr. Mautz: What for?

A. Well, I was waiting for my mail.

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

Mr. Freed: Mr. Mautz, I would like to proceed.

Mr. Mautz: All right, sure.

Mr. Freed: Thank you very much for reminding him.

Q. (By Mr. Freed) Now what were you doing when you fell, Mr. Bromberg?

A. When I fell?

Q. Yes, sir.

A. Well, when I fell I felt hurt. I cried with pain, and then they had to take me to my room and put me to bed.

Q. You fell down on the floor? A. Yes.

Q. And somebody picked you up?

A. Yes, somebody picked me up.

Q. And carried you up to your room?

A. Yes.

Q. Now what did you say caused you to fall? Why did you fall down? What made you fall down? [9]

A. Because the little—a young lady, a girl—a young lady; I don't remember exactly who it was.

Q. Well, that is what I would like to know. I would like to have you tell me what this young lady did to cause you to fall. I believe you said in your complaint and you said in answer to Mr. Mautz's question that you were standing near the desk at the Congress Hotel waiting for your mail.

A. Yes.

Q. Now what happened then?

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

A. While I was waiting for the mail I found a young girl there occupied with the clerk in conversation. I waited until she was through with her conversation and then I will try to talk to him. What was your question?

Q. That is right. Then what happened next? You were waiting there, and what happened after that? You said you were waiting behind this young girl and you were waiting to go up and talk to the clerk?

A. Yes.

Q. Then what happened? What happened next?

A. I was waiting until this girl would be through and then I will talk to the clerk.

Q. Then what happened?

A. I can't remember exactly about what happened.

Q. Later on you fell to the floor. Now what happened while you waiting there behind this girl? What happened next [10] now?

A. I was waiting behind this girl, and when she was through——

Q. (Interrupting) What did she do?

A. She pushed me; she gave me a strong push in my chest and threw me to the floor. She had room to walk around, and she pushed me right on my chest and threw me to the floor.

Q. Then she pushed you on your chest?

A. Yes.

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

Q. What part of her body pushed you on your chest? A. What?

Q. What part of her body touched you? With her hands?

A. Yes, with her hands, right on the chest.

Q. Did her hands——

A. (Interrupting) Yes, right on my chest, and I fell on the back.

Q. The girl's hands pushed you? Her hands were on your chest and she pushed you down? Is that it? A. What?

Q. You said the girl pushed you down?

A. Yes.

Q. And you said she pushed you on your chest?

A. On my chest.

Q. What part of her body struck your chest, her hands? What part of the girl's body struck your chest? A. I don't know. I knew—— [11]

Q. You knew what?

A. I knew the action of her hands.

Q. Her hands pushed you? A. Yes.

Q. You understand what I am asking you?

A. No.

Q. Well, you said the girl pushed you down. That is right, isn't it? A. Yes.

Q. And you said she pushed you on your chest?

A. Yes.

Q. Now did she push you with her hands? Did the girl push you with her hands?

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

A. With her hands, sure.

Q. Well, that is what I am asking you. You were standing back of her waiting at the counter there, at the desk? A. What?

Q. You were waiting at the desk in the hotel?

A. I was waiting at the desk until she would be through.

Q. And her back was turned toward you, wasn't it? A. What?

Q. The girl's back was toward you? You were behind the girl? You were standing behind her?

A. I was standing on the side of the girl waiting until she would be through. [12]

Q. Well, were you standing behind her, toward her back, or at her side? A. Behind her.

Q. And did she turn around and shove you?

A. What?

Q. Did she turn around and face you and shove you down? A. Yes.

Q. Was she running or walking?

A. I don't know why she have to do that because she had plenty of room around me, and yet she went and pushed me right on my chest and threw me down.

Q. Well, was she walking or running or standing still when she shoved you down?

A. She was right near me on the place there.

Q. She was standing still when she shoved you down? A. Yes, she was standing.

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

Q. She was not running?

A. She was not running.

Q. Was she walking?

A. Yes, she was walking.

Q. She was not standing still then?

A. I don't remember that, but I remember what happened.

Q. She was walking? When she shoved you down, as you say, she was walking?

A. When she shoved me down? [13]

Q. Yes, sir. A. I guess she was walking.

Q. I thought you were standing right behind her. I thought you were standing right behind the girl. You said you were standing right behind her?

A. Yes.

Q. Now would she have to walk to reach you, to get to where she could shove you?

A. I don't know what way she moved; I cannot describe it.

(A recess was then taken, after which the taking of the deposition was continued as follows:)

Q. (By Mr. Freed) You said that you were standing waiting to talk to the clerk at the desk, to get your mail or for some other purpose?

A. Yes, and I found another girl occupied the conversation. I waited until she would be through and then I would talk to him.

Q. And then she, you said, shoved you down?

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

You said she shoved you and caused you to fall down? A. Yes.

Q. Now how did that happen? Did she turn around and shove you, or what did she do? Just what did she do?

A. I cannot tell the action but I knew the deed, what was done.

Q. You don't remember just how it happened, though? [14]

A. Well, I remember most of it.

Q. Well, will you tell me what you remember?

A. I have told you that.

Q. Yes, you told me that you were standing behind her there at the counter waiting. You said you were standing behind the girl at the counter. Now what happened next?

A. I was behind her or at the side of her. I was waiting until she would be through and then I will come forward.

Q. And then what happened? What did she do then?

A. I don't remember what she has done.

Q. You said that she shoved you down?

Mr. Mautz: "Pushed" was his word.

Q. (By Mr. Freed) Pushed you down?

A. Yes.

Q. You were standing there either beside her or back of her, and you said she pushed you down.

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

Did she turn around and push you down with her hands, or what did she do?

A. Yes, she pushed me down with her hands, sure.

Q. Do you remember whether you were standing by her side or back of her? You said once you were standing back of her, and just now you indicated that perhaps you were standing beside her and I wondered which it was.

A. The girl was occupied with the clerk and I was waiting until she will finish her conversation and then I will occupy the clerk. [15]

Q. Were you waiting behind the girl or to the side of the girl?

A. Yes, I was waiting behind her.

Q. Behind the girl? A. Yes.

Q. And then what did the girl do?

A. The girl—while I was standing there and waiting until she was through, instead of having plenty of room to leave she went—it wasn't good enough and she went and pushed me right on the floor.

Q. Then she turned around and pushed you? Is that right?

A. I met her with the front, on the push.

Q. Just one more question on that. How far away from this girl were you standing when you were waiting for her to get through so you could

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

talk to the clerk? How far away from the girl were you?

A. Do you mean how far away from me?

Q. How far away from you was the girl when you were standing there waiting to talk to the clerk?

A. Right by the side of her.

Q. Would you say you were almost touching her? Were you that close?

A. I don't remember anything about close; right by her side.

Q. Not very far away? A. No.

Q. Would you say that you were as much as a foot away, twelve [16] inches away?

A. Between?

Q. Yes.

A. I didn't know the measure, but I know I was close to her. It wasn't far.

Q. You were quite close to her? A. Close

Q. And you were taken up to your room, you said, after you fell to the floor? A. Yes.

Q. Where were you taken from there, do you remember? To a hospital? A. To the hospital.

Q. And you were under a doctor's care?

A. Yes, I was under a doctor's care. The girl had plenty of room to walk around. She had no business coming to me and pushing me.

Q. Did you see the girl after you had fallen to the floor? Did you see her any more?

A. I don't think so.

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

Q. And you don't remember who picked you up?

A. No. That was what made me all the trouble.

Mr. Freed: I think that is all.

(Witness excused.) [17]

State of Oregon,

County of Multnomah.—ss.

I, the undersigned, Edwin L. Holmes, a Notary Public for Oregon, do hereby certify that on the 7th day of December, 1942, at the hour of 10:20 o'clock A.M. of said date, before me, as such Notary, at the library of the United States Court House, in the City of Portland, County of Multnomah, and State of Oregon, personally appeared pursuant to the stipulation herein set out the above named plaintiff, I. Bromberg; Mr. Robert T. Mautz appearing as attorney for the plaintiff and Mr. Edgar Freed appearing as attorney for the defendant, and the deposition of the said I. Bromberg was thereupon taken on oral interrogatories, the said witness having been first duly sworn by me to testify the truth, the whole truth, and nothing but the truth.

I further certify that all interrogatories propounded to said witness, together with the answers of said witness thereto and other proceedings occurring upon the taking of said deposition, were then and there taken down by me in shorthand and thereafter

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

by me reduced to typewriting, that the foregoing 17 pages, numbered from 1 to 17, inclusive, are a full, true, and accurate transcript of my said shorthand notes, and that the witness testified as therein set forth.

Witness my hand and notarial seal at Portland, Oregon, this 9th day of December, 1942.

[Seal]

EDWIN L. HOLMES,

Notary Public for Oregon.

My Commission expires July 25, 1944.

[Endorsed]: Filed Dec. 10, 1942. [18]

Mr. Freed: I want to offer in evidence the plaintiff's complaint, which was Defendant's Pre-Trial Exhibit 15.

Mr. Mautz: No objection.

The Court: Admitted. [74]

(The complaint in this case so offered and received, having been previously marked Defendant's Pretrial Exhibit 15, was further marked "and trial".)

DEFENDANT'S PRE-TRIAL AND TRIAL
EXHIBIT NO. 15

In the District Court of the United States
for the District of Oregon

Civil No. 1389

I. BROMBERG,

Plaintiff

vs.

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Defendant

COMPLAINT

The plaintiff complains of the defendant and for
cause of action alleges:

I

That at all times herein mentioned the defendant was and is a foreign corporation, duly authorized to transact business in the State of Oregon and is transacting business in said state as a telegraph company and with its principal office and place of business in the City of Portland, Oregon; that in connection with its business in the State of Oregon the defendant employed numerous persons to pick up and deliver messages and packages; that at all times herein mentioned, one Genevive Cline was employed by the defendant as a messenger and among other things, picked up and delivered messages for the defendant at hotels and business houses in the downtown district of Port-

land, Oregon and that at the time of the accident hereinafter referred to the said Genevive Cline was acting in the course of her employment for the defendant and in the furtherance of its business.

II

That on the 1st day of June, 1942 and prior thereto the plaintiff resided at the Congress Hotel in Portland, Oregon and on said date was standing behind the said Genevive Cline near the main desk of said hotel in the lobby thereof awaiting his turn to ask for his mail. That said Genevive Cline, then and there acting for and on behalf of the defendant, carelessly, recklessly and negligently made a sudden and abrupt turn from said desk and walked directly into and against the plaintiff, knocking him to the floor of said hotel lobby and causing the injuries hereinafter described.

III

As a direct and proximate result of the carelessness, recklessness and negligence of the defendant through its said employee as aforesaid the plaintiff sustained a fracture of the neck of the right femur with external rotation of the distal fragment and some coxavara and was caused to suffer physical pain and mental anguish and to become lame and disabled and was required to be hospitalized and to be attended by physicians and to be operated upon, and the plaintiff has been disabled and under medical treatment and hospitalized ever since and will be for an indefinite

time in the future all to his general damage in the sum of \$7500.00.

IV

That by virtue of said injuries the plaintiff has been caused to incur expenses for hospital, nursing, physicians, X-rays, rest home, ambulance and wheel-chair in the sum of \$1,413.70 to date which the plaintiff claims as special damages.

V

That this controversy is between citizens of different states and the amount involved exceeds the sum of \$3000.00, exclusive of interest and costs.

Wherefore, plaintiff prays judgment against the defendant for the sum of \$7500.00, general damages and the further sum of \$1,413.70, special damages and for his costs and disbursements herein incurred.

WILBUR, BECKETT,
HOWELL & OPPEN-
HEIMER

By Robert T. Mautz

Attorneys for Plaintiff
1001 Board of Trade
Building
Portland, Oregon

United States of America

District of Oregon—ss:

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of Com-

plaint (exhibit 15) in cause No. Civil 1389, I, Bromberg vs. Western Union Telegraph Company, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this August 30, 1943

[Seal] LOWELL MUNDORFF

Clerk,

By F. L. BUCK

Chief Deputy Clerk

[Endorsed]: Filed September 16, 1942.

The Court: What is in the complaint that you have in mind?

Mr. Freed: Well, I have in mind that the complaint says—may I read that little part here, your Honor? The complaint says that the messenger carelessly and recklessly—

The Court: Pushed him?

Mr. Freed: No, he didn't say pushed him. That is just what I want.

The Court: All right. I get your point. Why did you amend your answer? Tell me that.

Mr. Freed: To set up contributory negligence. I had not ever talked to Mr. Bromberg—

The Court: I remember now.

Mr. Freed: —and after taking his deposition—

The Court: I remember now.

Mr. Freed: That was it. I believe that we are ready to close our case. The defendant rests.

REBUTTAL

Mr. Mautz: Call Mr. Mercer.

GEORGE A. MERCER

was thereupon produced as a witness in rebuttal, in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

Direct Examination [75]

By Mr. Mautz:

Q. Your name is George A. Mercer?

A. Yes, sir.

Q. What is your occupation?

A. Manager of the Claim Department of the Aetna Life Insurance Company.

Q. In Oregon? A. Oregon.

Q. How long have you occupied that position?

A. Twenty-six or twenty-seven years.

Q. Did one of your affiliated companies have an interest because of insurance in the Congress Hotel in June of '42? A. Yes.

Q. Mr. Mercer, do you have a number of investigators or adjusters working under you?

A. Yes; ten or a dozen.

(Testimony of George A. Mercer.)

Q. Are they generally instructed as to what they are to secure in the way of information when they investigate an accident? A. Usually.

Q. Yes. State whether or not they are instructed to get all of the information that is known to witnesses whom they interrogate?

A. Yes, they are instructed to. I want to qualify that a little by saying six of my boys are attorneys and are supposed to know what they are after, and this man in particular that took this was an attorney, had years of experience back of him, and I told [76] him to go on up and cover it.

Q. And in covering it you mean get all the information that every given person has?

A. Everything that is incidental to the alleged accident.

Q. And who was the man in your department who investigated the accident in which Mr. Bromberg suffered injury in the Congress Hotel on June 1st, 1942? A. William Bembridge.

Q. Is he with you at this time? A. No.

Mr. Mautz: That is all.

Mr. Freed: No questions.

(Witness excused.)

C. V. COWDEROY

was thereupon produced as a witness in rebuttal, in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Mautz:

Q. Mr. Cowderoy, your name is E. V. Cowderoy?
A. That is right.

Q. What is your business?

A. Claims Manager.

Q. For whom?
A. United Pacific. [77]

Q. And is William Bembridge one of your employees?
A. Yes, sir.

Q. Working out of your department?

A. Yes, sir.

Q. I will ask you to state whether you received a phone call from an attorney involved in this case today as to Mr. Bembridge's whereabouts?

A. Yes, sir.

Q. And about what time was that?

A. Just shortly before noon, I would say.

Q. And who was that attorney?

A. Mr. Mautz.

Q. Myself?
A. Yes, sir, that is right.

Q. And what did you ascertain at that time in trying to find out where Mr. Bembridge was?

A. I checked with the telephone girl and was informed he would not be back until tomorrow morning.

Q. That he would not be back?
A. Yes.

Q. And was it possible to find out in your office where he could be located now?
A. No, sir.

(Testimony of C. V. Cowderoy.)

Q. Or where he is now?

A. No; just out in the territory. [78]

Q. And he will not be available during the business or court day until tomorrow morning?

A. That is right.

Mr. Mautz: That is all.

The Witness: I could see that you had him by nine o'clock or ten o'clock tomorrow.

Mr. Mautz: Pardon me?

The Witness: I could have him in the morning.

Mr. Freed: Nine o'clock? A. Yes.

Mr. Mautz: Q. In other words, he might be reached at home to night? A. Yes.

Mr. Mautz: That is all.

Mr. Freed: That is all.

(Witness excused.)

Mr. Mautz: If the Court please, that was the best I was able to do in trying to get the particular individual that conducted this investigation. In view of the witness Lenhart's own testimony that he may have made the statement to this man, which I laid as impeachment, I think that probably would be sufficient anyhow, but, as I say, if your Honor would want anything in addition from Mr. Bembridge's own lips I found as soon as I left the court room—and I called from the Library—I would not be able to get it [79] before tomorrow morning; so if your Honor felt that was an important part of the case, just what transpired between Lenhart and that particular investigator, I would like the privilege of calling him in the

morning and having him tell his story. If your Honor does not think that is important to your Honor's decision on the outcome of course there would be no need to take that additional time.

The Court: Everybody will feel better if you call him, but I would like you to argue the case as much as you can now.

Mr. Mautz: Well, with the exception of Mr. Bembridge the plaintiff rests.

Mr. Freed: Whatever the Court wishes to do about it, and counsel, will be completely satisfactory to me, but I was in hopes that we could complete this case today. But when we checked through the evidence we didn't—I didn't and I don't think Mr. Mautz did—have any idea that the case would run over today, and I am willing to stipulate if he were here that he would say he asked him that. I don't want to deprive counsel of any evidence he may have. Obviously I will have to be here. Whatever the Court says.

Mr. Mautz: If Mr. Freed is willing to stipulate to let the record show that Mr. Bembridge, when present, would testify that he took this statement from Lenhart and he asked Lenhart to tell him everything that he knew about this accident, and Lenhart told him what was in that statement which was written down, and that when that was completed Lenhart stated that was all he knew about [80] it, why, if the record can so show I would not have any purpose in calling Bembridge.

Mr. Freed: I don't know whether he would say

it or not, but I am willing to let the record show that, if we don't have to go over until tomorrow.

The Court: You so stipulate?

Mr. Freed: I so stipulate; yes.

(Reporter's Certificate attached.)

[Endorsed]: Filed June 22, 1943. [81]

[Endorsed]: No. 10542. United States Circuit Court of Appeals for the Ninth Circuit. Western Union Telegraph Company, a corporation, Appellant, vs. I. Bromberg, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed September 7, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10542

I. BROMBERG,

Appellee,

vs.

WESTERN UNION TELEGRAPH COMPANY,

Appellant

STATEMENT OF THE POINTS ON WHICH
THE APPELLANT INTENDS TO RELY

Pursuant to Rule 19(6) of the Rules of this Court, the appellant presents the following statement of the points on which it intends to rely on this appeal:

(1) The trial court erred in finding that Genevieve Cline, the defendant's messenger girl, was negligent, and that negligence on her part proximately caused the injuries to plaintiff. (See Findings of Fact II, III and V; Certified Record, page 14.)

(2) The trial court erred in finding that said Genevieve Cline made an abrupt turn and walked directly into and against the plaintiff. (See Findings of Fact II and III; Certified Record, page 14.)

(3) The trial court erred in finding that the plaintiff was not guilty of any negligence (see Findings of Fact IV, Certified Record, page 14), and in not finding that the plaintiff was guilty of contributory negligence.

(4) The trial court erred in concluding that the plaintiff was entitled to recover from the defendant any sum whatever, and in giving judgment against the defendant for any sum whatever. (See Conclusions of Law, I, and Judgment; Certified Record, page 15.)

(5) The trial court erred in not granting the plaintiff's motion to dismiss. (See Transcript of Testimony, pages 51 to 53.)

(6) The trial court erred in finding that said Genevieve Cline, in coming in contact with the plaintiff, was acting for the defendant. (See Findings of Fact I, III and V; Certified Record, pages 13 and 14.)

(7) The trial court erred in finding that the plaintiff was specially damaged in a sum of more than \$1,413.70, and in concluding that the plaintiff was entitled to recover from the defendant special damages in excess of said sum, and in giving judgment against the defendant for special damages in excess of said sum, (see Findings of Fact, VII, Conclusions of Law, I, and Judgment; Certified Record, page 15), in view of the allegations of paragraph IV of the Complaint (see Certified Record, page 3) and in view of the contentions of the plaintiff as defined in the Pre-Trial Order (see Certified Record, page 9.)

SIMON, GEARIN, HUM-
PHREYS & FREED
EDGAR FREED

Attorneys for Appellant

State of Oregon

County of Multnomah—ss.

Service of the within Statement of the Points on Which the Appellant Intends to Rely is hereby accepted in Portland, Multnomah County, Oregon, this 4th day of September, 1943, by receiving a copy thereof, certified to as such by Edgar Freed, Attorney for Appellant.

ROBERT T. MAUTZ,

By F. B. KEITH

Attorney for Appellee

[Endorsed]: Filed Sept 7, 1943. Paul P. O'Brien, Clerk.

